(17,795.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 310.

PETER AMBROSINI, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas had at a regular term of the district court of the United States of America for the northern division of the northern district of Illinois, begun and held in the United States court-rooms, in the city of Chicago, in said division and district, on the third Monday of December, it being the eighteenth day thereof, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-fourth year.

Present: The Hon. Christian C. Kohlsaat, judge presiding; John C. Ames, United States marshal for said district, and T. C. MacMillan, clerk of said district court.

UNITED STATES
vs. } 3125.
PETER AMBROSINI.

Be it remembered that heretofore, to wit, on the 27th day of October, A. D. 1899, it being one of the days of the July term of the district court of the United States for the northern division of the northern district of Illinois, begun and held in the United States court-rooms, in the city of Chicago, in the said division and district, on the first Monday of July, it being the 3rd day thereof, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-fourth year, before the Hon. Christian C. Kohlsaat, judge of said court, presiding, the following order was had and entered of record in said cause, to wit:

THE UNITED STATES
vs. } 3125. Sec. 7, 17. Vio. Int. Rev. Laws.
PETER AMBROSINI.

Come the grand jury this day and return in open court an indictment against Peter Ambrosini, the defendant herein.

Whereupon, on motion of the district attorney,

It is ordered by the court that the said indictment be filed and the cause placed upon the dockets of this court.

2 And afterwards, to wit, on the 27th day of October, A. D. 1899, an indictment was filed in the clerk's office of said court in the above-entitled cause, said indictment being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the October Adjourned Term, in the Year of Our Lord Eighteen hundred and ninety-nine.

NORTHERN DISTRICT OF ILLINOIS,
Northern Division, } *ss:*

The grand jurors for the United States of America, inquiring for the northern division of the northern district of Illinois, upon their

oath present that Peter Ambrosini, late of the city of Chicago, in the said division and district, on the twentieth day of August, in the year of our Lord eighteen hundred and ninety-eight, at Chicago aforesaid, in the division and district aforesaid, unlawfully did make, sign, and issue a certain instrument, document, and paper, to wit, a certain grocery bond, of the tenor following—that is to say:

Grocery Bond.

Know all men by these presents that we, Peter Ambrosini, as principal, and Thomas J. Fincane and Nicholas J. Sinott, as sureties, of the county of Cook and State of Illinois, are held and
3 firmly bound unto the People of the State of Illinois in the penal sum of three thousand dollars; for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of August, A. D. 1898.

The condition of this obligation is such that whereas the above-bounden Peter Ambrosini has obtained a license to keep a dram shop at No. 78*th* E. State Str., in said city, until 30th Dec., A. D. 189–:

Now, if the said P. Ambrosini shall well, truly, and promptly pay or cause to be paid all damages to any person or persons which may be inflicted upon them, either in person or property or means of support, by reason of his or their selling or giving away intoxicating liquors in any quantity, to be drank in, on, or about the building or premises where sold, or to be drank in any adjoining room, building, or premises or other place of public resort connected with said building, then this obligation to be void; otherwise to remain in full force and effect.

PETER AMBROSINI. [SEAL.]
T. J. FINNCANE. [SEAL.]
N. J. SINNOTT. [SEAL.]

4 without the same bond being stamped with a stamp or stamps in the amount of fifty cents for denoting the internal-revenue tax imposed upon such bonds by the act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," which said bond then and there was not such a bond as was or might be required in legal proceedings, nor a bond issued by the officers of the United States Government, or by the officers of any State, county, town, municipal corporation, or other corporation exercising the taxing power, nor a bond issued by any State, county, town, or other municipal corporation in the exercise of functions strictly belonging to it in its ordinary governmental, taxing, or municipal capacity, nor a bond issued by a co-operative building and loan association whose capital stock did not exceed ten thousand dollars, nor a bond issued by a building and loan association or company that made loans only to its shareholders, against the peace and dignity of the said United

States and contrary to the form of the statute of the same in such case made and provided.

And the grand jurors aforesaid upon their oath aforesaid do further present that the said Peter Ambrosini, on the said thirtieth day of August, in the same year eighteen hundred and
5 ninety-eight, at Chicago aforesaid, in the division and district aforesaid, unlawfully did make, sign, and issue a certain other instrument, document, and paper, to wit, a certain saloon bond of the following tenor—that is to say:

Saloon Bond.

Know all men by these presents that we, Peter Ambrosini, as principal, and Thomas J. Finncane and Nicholas J. Sinnott, as sureties, of the county of Cook and State of Illinois, are held and firmly bound unto the City of Chicago in the penal sum of five hundred dollars; for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of August, A. D. 1898.

The condition of this obligation is such that whereas the above-bounden Peter Ambrosini has obtained a license to keep a dram shop until 30th Dec., A. D. 1898, at No. 78*½* A. State Str., in said city:

Now, if the said Peter Ambrosini shall faithfully observe and keep all ordinances now in force or hereafter to be passed during
6 the period of such license, and shall keep closed all doors opening out upon any street from the bar or room where such liquors are sold on Sunday, and that all windows opening upon any street from such bar or room where such liquors are sold shall be provided with blinds, shutters, or curtains on Sunday, so as to obstruct the view from such street into such rooms; and shall prevent all playing for money, liquor, or any article or thing upon any table of any kind, or with cards or dice, or with pigeon-holes, or upon or with any article or thing whatever; and shall not keep any billiard table on or about the said premises without paying to said city the proper license or penalty therefor, whether in actual use or not; and shall not keep any ball alley or pin alley on or about the premises without paying to said city the proper license or penalty therefor, whether in actual use or not; and shall allow no vagrant, no keeper of a house of ill-fame, no prostitute, no drunken or disorderly person in or about the premises; and shall allow no concert, exhibition, ball, dance, or play to be given or performed in the same room where the liquors are sold; and shall also, immediately upon a notice of revocation of this license by the mayor (in case of such revocation), cease to keep such premises open, and shall not sell, give away, or in any manner deal in, by himself, servant, or any other person, any such liquor after notice of said revocation is left at the bar, and in case said licensee shall sell and convey said prem-

ises, said purchaser shall well and faithfully observe and
7 perform all requirements upon said license by the conditions of this bond and the ordinance of said city until such time as said license shall be legally transferred upon the books of the city, then this obligation to be void; otherwise to be and remain in full force and effect.

PETER AMBROSINI. [SEAL.]
T. J. FINNCANE. [SEAL.]
N. J. SINOTT. [SEAL.]

Approved:
JOS. S. MARTIN.

without the last-mentioned bond being then and there stamped with an adhesive stamp or stamps in the amount of fifty cents for denoting the internal-revenue tax imposed upon such bonds by the act of Congress of the said United States, approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes;" which said bond in this court mentioned then and there was not such a bond as was or might be required in legal proceedings, nor a bond issued by the officers of the United States Government, nor a bond issued by the officers of any State, county, town, municipal corporation, or other corporation exercising the taxing power in the exercise only of functions strictly belonging to it in its ordinary governmental, taxing, or municipal capacity, nor a bond issued by a co-operative building and loan association
whose capital stock did not exceed ten thousand dollars, nor
8 yet a bond issued by a building and loan association or company that made loans only to its stockholders, against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

S. H. BETHEA,
United States Attorney.

Endorsed: No. 3125. United States district court, northern district of Illinois, northern div. The United States of America vs. Peter Ambrosini. Indictment on sect. 7, act June 13, 1898 (30 Stat. at L., 452; see also sec. 17 and "Schedule A," bond). (Internal-revenue laws.) A true bill. Gardner W. Thompson. Filed in open court this 27th day of October, A. D. 1899. T. C. MacMillan, clerk. Bail, $100.00.

9 And afterwards, to wit, on the 17th day of November, A. D. 1899, the following order was had and entered of record in said cause before the Hon. Christian C. Kohlsaat, judge, to wit:

THE UNITED STATES } 3125.
vs.
PETER AMBROSINI.

Come the parties, by their attorneys, and the defendant, by his counsel, moves the court to quash the indictment filed herein against him; whereupon it is ordered by the court that said motion be set down for hearing on November 20, A. D. 1899, at ten o'clock a. m.

And afterwards, to wit, on the 2nd day of February, A. D. 1900, there was filed in said court a motion to quash the indictment filed herein, said motion being in the words and figures following, to wit:

10 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the United States District Court in and for said District.

UNITED STATES }
vs.
PETER AMBROSINI. }

Now comes the defendant, Peter Ambrosini, by Moran, Mayer & Meyer, his attorneys, and respectfully moves the court to quash the indictment herein, and shows to the court that the said indictment and each count thereof is insufficient for the following several reasons:

1. The same does not state any charge against this defendant subject to punishment under any statute of the United States.

2. The State of Illinois is sovereign, and as such sovereign State, under its constitution, has erected within its borders the city of Chicago, and the said city of Chicago is one of the instrumentalities by which the said State of Illinois is enabled to perform its functions of State sovereignty.

3. That under the constitution of said State it becomes its
11 duty to protect the people thereof by the enactment and enforcement of laws looking to the good government of said State and every part thereof, and protecting the good morals, good health, and peaceable government of the same.

4. That under the constitution of the State of Illinois the said State is empowered to tax, regulate, and control certain specific occupations, among others those of dealers in spirituous and intoxicating liquors, and under such constitutional provision of the legislature of said State, with the approval of the executive of said State, laws have been passed regulating the traffic in intoxicating liquors and controlling and regulating the business of liquor dealers.

5. That under this well-recognized power the said State has delegated to the city of Chicago, by proper enactment, the like power to regulate and control the traffic in intoxicating liquors and the business of liquor dealers.

6. Under such delegated authority the said city of Chicago has enacted, under the proper rules and regulations, certain ordinances of said city prescribing how, when, and in what manner said business of dealing in intoxicating liquors shall be carried on, regulated, and controlled; that among other requirements of the said legislation regulating and controlling the business of liquor dealers in the said city of Chicago the bonds set out in said indictment and in each count thereof were executed and delivered to the proper
12 officers of said city, accepted by said officers, and the license provided under the said laws, rules, and regulations of the

city of Chicago issued to the said defendant, authorizing him to carry on the business of a retail dealer in liquor under what is known as the dram-shop act of the State of Illinois.

7. That in order for the authorities of the city of Chicago to properly regulate and control the said business of retail dealer in liquors, and conserve the peace, happiness, good order, and good health of its inhabitants, the execution, delivery, and acceptance of said bonds set out in said indictment *was* necessary, and that any attempt on the part of the Government of the United States to prescribe that such bonds, before their delivery, should be stamped by a 50-cent adhesive stamp, under the war-revenue act of 1868, is unconstitutional and void.

8. That the bonds referred to in both counts of the indictment are bonds required to be and in fact executed in the exercise of functions strictly belonging to both and either of the State of Illinois and city of Chicago in the ordinary governmental taxing and municipal capacity of said State and city.

9. That said indictment and each count thereof is insufficient in form.

10. Said indictment and each count thereof is insufficient in substance.

13 11. The said act of Congress referred to in said indictment does not extend to and apply to the bonds and instruments mentioned in said indictment.

PETER AMBROSINI,
By MORAN, MAYER & MEYER,
His Attorneys.

And afterwards, to wit, on the 2nd day of February, A. D. 1900, the following order was had and entered of record in said cause before the Hon. William H. Seaman, judge, to wit:

THE UNITED STATES
vs. } 3125.
PETER AMBROSINI.

This cause coming on to be heard on motion of the defendant to quash the indictment herein, come the parties, by their attorneys, and the court, having heard the arguments of counsel and not now being fully advised in the premises, takes the matter under advisement.

And afterwards, to wit, on the 7th day of February, A. D. 1900, there was filed in the clerk's office of said court the opinion of the court in the above-entitled cause, said opinion of court being in the words and figures following, to wit:

District Court of the United States, Northern District of Illinois, N. D.

UNITED STATES *vs.* PETER AMBROSINI. } On Motion to Quash Indictment.

SEAMAN, *District Judge:*

The indictment charges the defendant on two counts for executing and issuing two bonds respectively without the revenue stamp required by the act of June 13, 1898, one being a bond to the people of the State of Illinois, as demanded by statute, for obtaining a "license to keep a dram shop," and the other a bond to the city of Chicago, as required by ordinance of the city for like purpose. The contention on behalf of the defendant is twofold: (1) That the bonds in question are exempt under the terms of this act of Congress; and (2), if included within the terms of the act, the provision is unconstitutional in respect of such bonds as instrumentalities of the State and municipal government. I am of opinion that neither of these propositions is tenable.

1. For the first contention sec. 17 of the act is cited, but the exemptions there provided relate exclusively to bonds and other instruments issued by governmental authorities, and with the utmost liberality of construction are not applicable to bonds executed by individuals to the State or municipality for a license or other individual benefit.

2. If the bonds can be regarded as necessary means or "instrumentalities for the exercise of the functions of State or municipal government," as counsel insists, the second proposition is not without force—State *ex rel.* Lahey *v.* Garton, 13 Ind., 1; Jones *v.* Estate of Keep, 19 Wis., 369; Sayles *v.* Davis, 22 Wis., 225; Fifield *v.* Close, 15 Mich., 505. But the business of saloon-keeping is neither a governmental function nor essential to its administration, although good government may demand that the business be permitted only under regulations secured by bonds on the part of the applicant. The bond so exacted is a mere incident of the regulation. It is in no sense the act or obligation of the public or of a representative of the public, but is the applicant's individual undertaking to obtain a personal privilege, and as such is certainly not an immune in respect of stamp duties required of other citizens executing
15 personal bonds or obligations. Neither the State nor its administration are affected directly or indirectly by the tax so imposed, as the bond must be executed and stamped when tendered, and if in any view an instrumentality of the State, it becomes such only when fully executed.

The motion to quash the indictment is overruled, and an order will so enter.

W. H. S.

Endorsed · No. 3125. United States *vs.* Peter Ambrosini. Opinion of court. Filed Feb. 7, A. D. 1900. T. C. MacMillan, clerk.

And afterwards, to wit, on the 7th day of February, A. D. 1900, the following order was had and entered of record in said cause by direction of Hon. Wm. H. Seaman, district judge.

THE UNITED STATES
vs. } 3125.
PETER AMBROSINI.

The court, having considered the motion to quash the indictment herein and being fully advised in the premises, overrules the same.

And afterwards, to wit, on the 20th day of March, A. D. 1900, the following order was had and entered of record in said cause before the Hon. Christian C. Kohlsaat, judge, to wit:

THE UNITED STATES
vs. } 3125.
PETER AMBROSINI.

Come the parties, by their attorneys, and the defendant in his own proper person, and, being arraigned upon the indictment filed herein against him, the defendant pleads not guilty thereto.

The parties, by their attorneys, in open court waive a trial by jury and consent that this cause may be heard by the court without a jury, and, further, that this cause may be submitted to the court on briefs to be filed within one week.

16 And afterwards, to wit, on the 14th day of April, A. D. 1900, the following order was had and entered of record in said cause before the Hon. Christian C. Kohlsaat, judge, to wit:

THE UNITED STATES
vs. } 3125.
PETER AMBROSINI.

This cause coming on to be heard, comes the parties, by their attorneys, and the court, having considered and being now fully advised in the premises, finds the defendant, Peter Ambrosini, guilty as charged in the indictment filed herein against him; and, on motion of S. H. Bethea, Esq., United States attorney, it is ordered by the court that this cause be continued until Saturday, April 28, 1900, for sentence.

17 And afterwards, to wit, on the 28th day of April, A. D. 1900, came the defendant, by his attorney, and filed in said court a motion in arrest of judgment; which said motion is in the words and figures following, to wit:

UNITED STATES OF AMERICA:

In the District Court of the United States in and for the Northern District of Illinois.

UNITED STATE
v.
PETER AMBROSINI. } Gen. No., 3125.

Motion in Arrest of Judgment.

Now comes said defendant, Peter Ambrosini, and moved this honorable court in arrest of judgment, and as grounds of said motion states the following:

(1.) Because the said indictment herein and each count thereof are null and void.

(2.) Because the alleged acts charged in and by each of the counts of said indictment to have been done by this defendant do not constitute a crime or an offense cognizable by this court.

(3.) Because that part of the statute of the United States entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898, upon which said petitioner was convicted, is unconstitutional and void.

(4.) The judgment of said district court is contrary to law.

And for other causes of error not herein specifically set forth.

PETER AMBROSINI,
By MORAN, MAYER & MEYER,
His Attorneys.

LEVY MAYER, *Of Counsel.*

18 Endorsed: G. No., 3125. U. S. district court of Cook county. United States *vs.* Peter Ambrosini. Motion in arrest of judgment. Filed April 28, 1900. T. C. MacMillan, clerk.

And afterwards, to wit, *of* the 28th day of April, A. D. 1900, the following order was had and entered of record in said cause before the Hon. Christian C. Kohlsaat, judge, to wit:

THE UNITED STATES
vs.
PETER AMBROSINI. } 3125.

Come the parties, by their attorneys, and the defendant, by his attorney, enters his motion in arrest of judgment; which said motion is heard and overruled by the court, and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him, and showing no good and sufficient reason why sentence and judgment should not be pronounced, it is therefore considered by the court and as the sentence and judgment of the court upon the finding of guilty by the court, as aforesaid, that the defendant, Peter Ambrosini, forfeit and pay to the United States a fine in the sum of twenty-five dollars, for which let execution issue.

And afterwards, to wit, on the 28th day of April, A. D. 1900, there was filed in the clerk's office of said court a petition for writ of error, said petition being in the words and figures following, to wit:

19 UNITED STATES OF AMERICA:

In the District Court of the United States in and for the Northern District of Illinois.

THE UNITED STATES
vs.
PETER AMBROSINI. } Gen. No., 3125.

And now comes Peter Ambrosini, defendant in the above-entitled cause, and, feeling himself aggrieved by the judgment *od* this honorable court entered herein on the 28th day of April, A. D. 1900, petitions this court for an order allowing him, said defendant, to prosecute a writ of error to the honorable the Supreme Court of the United States under and in accordance with the laws of the United States in that behalf made and provided, and prays also that all further proceedings in this court be suspended and stayed until the determination of said writ of error by said the honorable Supreme Court of the United States.

And your orator will ever pray.

PETER AMBROSINI,
By MORAN, MAYER & MEYER,
His Attorneys.

LEVY MAYER, *Of Counsel.*

Endorsed: G. No., 3125. United States supreme court of Cook county. The United States *vs.* Peter Ambrosini. Petition. Filed April 28, 1900. T. C. MacMillan, clerk. Moran, Mayer & Meyer.

20 And afterwards, to wit, on the 28th day of April, A. D. 1900, the following order was had and entered of record in said cause before the Hon. Christian C. Kohlsaat, judge, to wit:

THE UNITED STATES
vs.
PETER AMBROSINI. } 3125.

Upon motion of Peter Ambrosini, defendant in said cause, and upon the filing of the petition for a writ of error and an assignment of errors, it is ordered that the writ of error be, and it hereby is, allowed, to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein, and that all further proceedings in this court be suspended and stayed until the determination of said writ of error by said Supreme Court of the United States.

21 And afterwards, to wit, on the 28th day of April, A. D. 1900, the following assignment of errors was filed in the

clerk's office of the district court of the United States for the northern district of Illinois, said assignment of errors being in the words and figures following, to wit:

Assignment of Errors.

In the District Court of the United States for the Northern District of Illinois, Northern Division.

THE UNITED STATES
vs.
PETER AMBROSINI. } Gen. No., 3125.

Comes now the defendant, Peter Ambrosini, defendant in the above-entitled cause, and files the following assignment of errors upon which he will rely in his prosecution of the writ of error to the above-entitled cause:

1. That said district court erred in overruling the motion of said defendant to quash the indictment in said cause.

2. That said district court erred in overruling the motion of said defendant in arrest of judgment.

3. That said district court erred in finding the defendant guilty and in rendering judgment against said defendant.

4. That said judgment is contrary to the law and the facts.

5. That said district court erred in not holding that part of the act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other
22 purposes," upon which said petitioner was convicted, unconstitutional, and in not adjudging said defendant by reason thereof entitled to his discharge from said indictment.

6. That said district court erred in holding that the acts charged in the indictment herein against said defendant came with section seven of the act of Congress approved June 13, 1898, and entitled "An act to provide ways and means to meet war expenditures and for other purposes."

7. That said district court erred in holding that said section seven applied to the acts charged in said indictment against this defendant.

Wherefore the said defendant and plaintiff in error prays that the judgment of said court be reversed, and that said indictment in said cause be quashed against him, said defendant.

MORAN, MAYER & MEYER,
Attorneys for said Defendant, Peter Ambrosini.

LEVY MAYER, *Of Counsel.*

Endorsed: G. No., 3125. U. S. district court of Cook county. The United States *vs.* Peter Ambrosini. Assignments of error. Filed April 28, 1900. T. C. MacMillan, clerk.

23 And afterwards, to wit, on the 28th day of April, A. D. 1900, there was filed in the clerk's office of the district court of the United States for the northern district of Illinois a bill of exceptions; which said bill of exceptions is in the words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the United States District Court in and for said Northern District.

UNITED STATES }
vs.
PETER AMBROSINI. }

Bill of Exceptions.

Be it remembered that heretofore, on the trial of the above-entitled cause, at the March term, A. D. 1900, before the Honorable Christian C. Kohlsaat, judge of said district court of the United States in and for the northern district of Illinois, the following proceedings were had and taken and the following evidence was offered, introduced, and considered:

Appearances: Mr. Solomon H. Bethea, United States district attorney, for said United States; Mr. Levy Mayer, of the firm of Moran, Mayer & Meyer, attorney for said defendant, Peter Ambrosini.

24 And the court now here certifiees that on November 11th, A. D. 1899, there was entered of record in said cause a motion to quash said indictment; that thereafter and on February 2d, A. D. 1900, there was filed in said cause a written motion to quash said indictment; which said motion is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the United States District Court in and for said District.

UNITED STATES }
vs.
PETER AMBROSINI. }

Now comes the defendant, Peter Ambrosini, by Moran, Meyer & Meyer, his attorneys, and respectfully moves the court to quash the indictment herein, and shows to the court that the said indictment and each count thereof is insufficient, for the following several reasons:

1. The same does not state any charge against this defendant subject to punishment under any statute of the United States.

2. The State of Illinois is sovereign, and as such sovereign State, under its constitution, had erected within its borders the city of

Chicago, and the said city of Chicago is one of the instrumentalities by which the said State of Illinois is enabled to perform its functions of State sovereignty.

3. That under the constitution of said State it becomes its
25 duty to protect the people thereof by the enactment and enforcement of laws looking to the good government of said State and every part thereof and protecting the good morals, good health, and peaceable government of the same.

4. That under the constitution of the State of Illinois the said State is empowered to tax, regulate, and control certain specific occupations, among others those of dealers in spirituous and intoxicating liquors, and under such constitutional provisions of the legislature of said State, with the approval of the executive of said State, laws have been passed regulating the traffic in intoxicating liquors and controlling and regulating the business of liquor dealers.

5. That under this well-recognized power the said State has delegated to the city of Chicago, by proper enactment, the like power to regulate and control the traffic in intoxicating liquors and the business of liquor dealers.

6. Under such delegated authority the said city of Chicago has enacted, under the proper rules and regulations, certain ordinances of said city prescribing how, when, and in what manner said business of dealing in intoxicating liquors shall be carried on, regulated, and controlled; that among other requirements of the said legislation regulating and controlling the business of liquor dealers in said city of Chicago the bonds set out in said indictment and in each count thereof were executed and delivered to the proper officers of said city, accepted by said officers, and the license provided
26 under the said laws, rules, and regulations of the city of Chicago issued to the said defendant, authorizing him to carry on the business of a retail dealer in liquor under what is known as the dram-shop act of the State of Illinois.

7. That in order for the authorities of the city of Chicago to properly regulate and control the said business of retail dealer in liquors and conserve the peace, happiness, good order, and good health of its inhabitants, the execution, delivery, and acceptance of said bonds set out in said indictment *was* necessary, and that any attempt on the part of the Government of the United States to prescribe that such bonds, before their delivery, should be stamped by a 50-cent adhesive stamp, under the war-revenue act of 1868, is unconstitutional and void.

8. That the bonds referred to in both counts of the indictment are bonds required to be and in fact executed in the exercise of functions strictly belonging to both and either of the State of Illinois and city of Chicago in the ordinary governmental taxing and municipal capacity of said State and city.

9. That said indictment and each count thereof is insufficient in form.

10. Said indictment and each count thereof is insufficient in substance.

11. The said act of Congress referred to in said indictment does not extend to and apply to the bonds and instruments mentioned in said indictment.

PETER AMBROSINI,
By MORAN, MAYER & MEYER, *His Att'ys.*

27 That thereafter and on February 7, A. D. 1900, after hearing the arguments of counsel, said court denied said motion to quash said indictment; to which said denial said defendant then and there duly excepted.

That thereafter and on March 20, A. D. 1900, said defendant was arraigned and entered his plea of "not guilty," and said defendant thereupon in open court waived a jury and submitted the trial of the issues herein to said court without a jury.

That thereupon said court proceeded to try said case, and upon the trial of said case the facts hereinafter set forth were stipulated between the parties hereto as the facts in said case upon which said trial was had, and that such facts so stipulated were received and considered as evidence by said court, and were all the facts and all the evidence offered by either party or heard or considered by said court upon the trial of said case; said facts so stipulated are as follows: That said defendant, on the 30th day of August, A. D. 1898, at the city of Chicago, in the State of Illinois, in the division and district aforesaid, made, signed, and executed a certain instrument, to wit, a certain "grocery bond," in words and figures as follows:

Know all men by these presents that we, Peter Ambrosini, as principal, and Thomas J. Finncane and Nicholas J. Sinott, as sureties, of the county of Cook and State of Illinois, are held
28 and firmly bound unto the People of the State of Illinois in the penal sum of three thousand dollars; for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of August, A. D. 1898.

The condition of this obligation is such that whereas the above bounden Peter Ambrosini has obtained a license to keep a dram shop at No. 78*th* E. State Str., in said city, until the 30th Dec., A. D. 189–:

Now, if the said P. Ambrosini shall well, truly, and promptly pay or cause to be paid all damages to any person or persons which may be inflicted upon them, either in person or property or means of support, by reason of his or their selling or giving away intoxicating liquors in any quantity to be drank in, on, or about the building or premises where sold, or to be drank in any adjoining room, building, or premises, or other place of public resort connected with said building, then this obligation to be void; otherwise to remain in full force and effect.

PETER AMBROSINI. [SEAL.]
T. J. FINNCANE. [SEAL.]
N. J. SINOTT. [SEAL.]

It was further stipulated and agreed that on said 30th day of August, A. D. 1898, said defendant did make, sign, and execute a certain other instrument in writing, being a "saloon bond," in
29 words and figures as follows:

Know all men by these presents that we, Peter Ambrosini, as principal, and Thomas J. Finncane and Nicholas J. Sinott, as sureties, of the county of Cook and State of Illinois, are held and firmly bound unto the city of Chicago in the penal sum of five hundred dollars; for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, administrators, and executors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of August, A. D. 1898.

The condition of this obligation is *sich* that whereas the above-bounden Peter Ambrosini has obtained a license to keep a dram shop until 30th Dec., A. D. 1898, at No. 78*th* E. State Str., in said city:

Now, if the said Peter Ambrosini shall faithfully observe and keep all ordinances now in force or hereafter to be passed during the period of such license, and shall keep closed all doors opening out upon any street from the bar or room where such liquors are sold on Sunday, and that all windows opening upon any street from such bar or room where such liquors are sold shall be provided with blinds, shutters, or curtains on Sunday, so as to obstruct the view from such street into such rooms, and shall prevent all playing for money, liquor, or any article or thing upon any table of any kind, or with cards or dice, or with pigeon-holes, or upon or
30 with any article or thing whatever, and shall not keep any billiard table on or about said premises without paying to said city the proper license or penalty therefor, whether in actual use or not; and shall not keep any ball alley or pin alley on or about the premises without paying to said city the proper license or penalty therefor, whether in actual use or not; and shall allow no vagrant, no keeper of a house of ill-fame, no prostitute, no drunken or disorderly person, in or about the premises; and shall allow no concert, exhibition, ball, dance, or play to be given or performed in the same room where liquors are sold; and shall also, immediately upon a notice of revocation of this license by the mayor (in case of such revocation), cease to keep such premises open, and shall not sell, give away, or in any manner deal in, by himself, servant, or any other person, any such liquors after notice of said revocation is left at the bar; and in case said licensee shall sell and convey said premises said purchaser shall well and faithfully observe and perform all requirements upon said license by the conditions of this bond and by the ordinance of said city until such time as said license shall be legally transferred upon the books of the city, then this obligation to be void; otherwise to remain in full force and effect.

PETER AMBROSINI. [SEAL.]
T. J. FINNCANE. [SEAL.]
N. J. SI*M*OTT. [SEAL.]

Approved: JOS. J. MARTIN.

31 It was further stipulated and agreed that neither of said instruments in writing was stamped with any adhesive stamp or stamps, in the amount of 50 cents or any other amount whatsoever, for denoting the internal-revenue tax upon bonds, under and by an act of Congress of the said United States approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes."

It was further stipulated and agreed that at the time said defendant made, signed, and executed said two instruments in writing that the same were made, signed, and executed under, pursuant to, and in conformity with certain acts of the legislature of the State of Illinois and ordinances of the city of Chicago; which said ordinances were duly passed by the common council of the city of Chicago and approved by the mayor of said city pursuant to the acts of said legislature in that behalf made and provided.

It was further stipulated and agreed upon said trial that said instrument in writing made, signed, and executed by said defendant, and hereinbefore first set forth and herein called a "grocery bond," was made, signed, and executed in pursuance to and in conformity with the laws of the State of Illinois in that behalf made and provided.

It was further stipulated and agreed that said instrument in writing hereinbefore set forth and hereinbefore called a "saloon
32 bond" was made, signed, and executed by said defendant under, pursuant to, and in conformity with the certain ordinance of said city of Chicago then in full force and effect; which said ordinance is as follows:

"The mayor of the city of Chicago shall, from time to time, grant licenses for the keeping of dram shops within the city of Chicago to persons who shall apply to him in writing therefor, and shall furnish evidence satisfying him of their good character. Each applicant shall execute to the city of Chicago a bond, with at least two sureties, to be approved by the city clerk or city collector, in the sum of five hundred dollars, conditioned that the applicant shall faithfully observe and keep all ordinances in force at the time of the application or thereafter to be passed during the period of the license applied for, and will keep closed, on Sundays, all doors opening out upon any street from the bar or room where such dram shop is to be kept; and that all windows opening upon any street from such bar or room shall, on Sundays, be provided with blinds, shutters or curtains, so as to obstruct the view from such street into such room. No application for a license shall be considered until such bond shall have been filed."

It was further stipulated and agreed that at the time of making, signing, and executing said instrument hereinbefore called a "saloon bond" there was then in full force and effect a certain ordinance of said city of Chicago; which said ordinance is as follows:

33 "Any license granted under this chapter may be revoked upon written notice by the mayor, whenever it shall appear to his satisfaction that the party so licensed shall have violated any

provisions of any ordinance of the city council relating to intoxicating liquors, or any condition of the bond aforesaid. Upon complaint to the mayor by two or more persons, that any place licensed as a saloon is a resort of disreputable persons, the mayor shall at once cause an investigation to be made as to such complaint, and if found to be true, he shall forthwith revoke the license issued to any person or persons to keep such saloon. Upon report to the mayor by the police department, that any saloon is the resort of disreputable persons, the mayor shall at once revoke the license of the keeper of such saloon."

It was further stipulated and agreed that said city of Chicago was a duly incorporated city, incorporated under the cities and villages act of said State of Illinois, and that it had full power and authority to enact said ordinances hereinbefore set forth, and to require the execution of said "saloon bond" by said defendant.

34 The court further certifies that the above and foregoing were all of the facts, evidence, or proceedings had, taken, or considered upon the trial of said cause.

The court further certifies that on April 27th, A. D. 1900, said court found the defendant guilty in manner and form charged in said indictment and imposed a fine upon said defendant in and for the sum of twenty-five dollars ($25); that to said finding said defendant then and there duly excepted and made and filed a motion in arrest of judgment; which said motion in arrest of judgment is as follows:

35 UNITED STATES OF AMERICA:

In the District Court of the United States in and for the Northern District of Illinois.

UNITED STATES
v.
PETER AMBROSINI. } Gen. No., 3125.

Motion in Arrest of Judgment.

Now comes said defendant, Peter Ambrosini, and moves this honorable court in arrest of judgment, and as gounds of said motion states the following:

(1.) Because the said indictment herein and each count thereof are null and void.

(2.) Because the alleged acts charged in and by each of the counts of said indictment to have been done by this defendant do not constitute a crime or an offense cognizable by this court.

(3.) Because this part of the statute of the United States entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898, upon which said petitioner was convicted, is unconstitutional and void.

(4.) The judgment of said district court is contrary to law.

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And for other causes of error not herein specifically set forth.

PETER AMBROSINI,
By MORAN, MAYER & MEYER,
His Attorneys.

36 That thereupon said court overruled said motion in arrest of judgment; to which action of said court in overruling said motion in arrest of judgment said defendant then and there duly *executed.*

And the court further certifies that the above and foregoing were all of the proceedings had or taken during the trial of said cause.

Forasmuch, therefore, as the proceedings, matters, and things hereinbefore stated do not fully appear of record, and in order that the same may so appear, the defendant hereby tenders this his bill of exceptions and asks that the same may be signed and sealed by the judge of said court pursuant to the statute in such made and provided, which is accordingly done on this 28th day of April, A. D. 1900.

C. C. KOHLSAAT, [SEAL.]
Judge of said District Court in and for the Northern District of Illinois.

37 NORTHERN DISTRICT OF ILLINOIS, }
Northern Division. }

I, T. C. MacMillan, clerk of the district court of the United States of America for the northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of the proceedings had in said court in case No. 3125, wherein The United States of America is the plaintiff and Peter Ambrosini is defendant, as the same appears from the records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 8th day of May, A. D. 1900.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN, *Clerk.*

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the district court in and for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between United States and Peter Ambrosini, a manifest error hath happened, to the great damage of the said Peter Ambrosini, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly

and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of Dist. Court U.S., Northern Dist. Illinois, 1855.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of April, in the year of our Lord one thousand nine hundred.

T. C. MACMILLAN,
Clerk of the District Court of the United States for the Northern District of Illinois.

Allowed by—
KOHLSAAT, *J.*

39 [Endorsed:] Writ of error. Filed May 10th, 1900. T. C. MacMillan, clerk. Copy deposited for the defendant in error in the clerk's office, U. S. district court, nor. dist. Illinois.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the foregoing-entitled cause this tenth day of May, A. D. 1900.

T. C. MACMILLAN,
Clerk United States District Court, Northern District of Illinois.

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States to United States, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States in and for the northern district of Illinois, wherein Peter Ambrosini is plaintiff in error and United States is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable C. C. Kohlsaat, judge of the district court of the United States in and for the northern district of Illinois, this 28th day of April, in the year of our Lord one thousand nine hundred.

KOHLSAAT, [SEAL.]
Judge of District Court, Northern District of Illinois.

Service of the within citation accepted this twenty-eighth day of April, 1900.

S. H. BETHEA,
District Attorney in and for the Northern District of Illinois.

41 [Endorsed:] United States of America. Peter Ambrosini, plaintiff in error, *v.* United States, defendant in error. Citation and acceptance thereon. Moran, Mayer & Meyer, law offices, Unity building, Chicago.

Endorsed on cover: File No., 17,795. N. Illinois D. C. U. S. Term No., 310. Peter Ambrosini, plaintiff in error, *vs.* The United States. Filed June 6th, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 79.

PETER AMBROSINI, *Plaintiff in Error,* vs. **THE UNITED STATES.** *Defendant in Error.*	In Error to the District Court of the United States, for the Northern District of Illinois.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This is a test case. Upon the same state of facts, two diametrically opposite judgments have been rendered in two District Courts. In the present case—*U. S.* v. *Ambrosini* (105 Fed., 239)—decided October 27, 1899, District Judge Seaman, sitting in the Northern District of Illinois, decided that a bond executed by a dramshop keeper to a state or municipality, under the law requiring such a bond as a condition precedent to the issuance of a license—must be stamped under the war revenue act of 1898. When the same question arose a few months later in the Eastern District of Missouri, Judge Adams, on March 3, 1900, de-

cided in *U. S.* v. *Owens* (100 Fed., 70) that such a bond need not be stamped. Though Judge Adams makes no reference to the opinion of Judge Seaman, it was brought to his attention during the argument in the *Owens* case. The same question also arose in the Circuit Court of Cook County (*People* v. *City of Chicago*, 31 Chicago Legal News, 247). In that case Judge Tuley decided on March 10, 1899, that the bond need not be stamped, and awarded a mandamus against the City of Chicago to issue a license upon an unstamped bond.

These are the only cases, so far as we can discover, in which a state of facts like that in this record has been passed upon.

This writ of error has been sued out to reverse the judgment of the District Court adjudging the plaintiff in error guilty of an offense under section 7 of the act of Congress, approved June 13, 1898, entitled, "An Act to provide ways and means to meet war expenditures, and for other purposes," otherwise known as the war revenue act of 1898.

The indictment contains two counts. The first charges that the defendant on August 30, 1898, executed a certain bond in the penal sum of $3,000, to the People ot the State of Illinois, without affixing to such bond a 50-cent revenue stamp, alleged to be required by said war revenue act.

The second count charges that the defendant on August 30, 1898, executed a certain bond to the City of Chicago, in the penal sum of $500, without affixing thereto a 50-cent revenue stamp, alleged to be required under said act. (Rec., pp. 1–4.)

A motion to quash the indictment was made (Rec., pp. 5–7), and overruled by District Judge Seaman (Rec., p. 8), and a jury being waived, the cause was submitted to the

court (Rec., p. 8), and the defendant was found guilty and fined $25. (Rec., p. 9.) The opinion of Judge Seaman is on page 7 of the record and is reported in 105 Fed., 239.

The errors assigned, among others, are that the District Court erred: (*a*) in overruling the motion to quash the indictment; (*b*) in overruling the motion in arrest of judgment; (*c*) in finding the defendant guilty; (*d*) in not holding that part of the act of Congress, approved June 13, 1898, under which the defendant was convicted, unconstitutional; (*e*) and in holding that the acts charged in the indictment came within section 7 of said act. (Rec., p. 11.)

BRIEF.

I.

THE BONDS IN QUESTION ARE EXPRESSLY EXEMPTED FROM TAXATION BY SECTION 17 OF THE WAR REVENUE ACT OF JUNE 13, 1898.

30 U. S. Statutes at Large, p. 455, Sec. 17.

(*a*) The war revenue act of June 13, 1898, must be strictly construed as against the government.

United States v. *Isham*, 17 Wall., 496, 504.

Hartranft v. *Wiegmann*, 121 U. S., 609, 616.

American Net & Twine Co. v. *Worthington*, 141 U. S., 468, 474.

Hugus v. *Strickler*, 19 Ia., 413, 416.

Ash's Annotated Internal Revenue Laws, p. 360, note C.

(*b*) There are exempted by necessary implication those cases to which the statute cannot constitutionally apply.

Endlich on the Interpretation of Statutes, p. 247, Sec. 179.

Opinion of Justices, 41 N. H., 553.

Prather v. *Pritchard*, 26 Ind., 65.

II.

THE BONDS IN QUESTION ARE EXACTED IN FAVOR OF THE PEOPLE BY THE LAWS AND ORDINANCES REGULATING THE SALE OF INTOXICATING LIQUORS, AND ARE THEREFORE INSTRUMENTALITIES OF THE STATE.

United States v. *Owens*, 100 Fed., 70.

Daly v. *Chicago*, 31 Chicago Legal News, 247.

And authorities cited under Point III, *infra*.

(*a*) The state has the supreme and absolute control of the issuing and granting of licenses, for the sale of intoxicating liquors within its borders, unhampered by restrictions of the Federal government.

License Cases, 5 How., 504, 574.
Mugler v. *Kansas*, 123 U. S., 623.
Kidd v. *Pearson*, 128 U. S., 1, 16.
Giozza v. *Tiernan*, 148 U. S., 657, 662.
In re Hoover, 30 Fed. Rep., 51.

(*b*) The war revenue act of June 13, 1898 imposes excise taxes on *transactions*, irrespective of who in the first instance is required to pay the same.

Telegraph Co. v. *Texas*, 105 U. S., 460.
Nicol v. *Ames*, 173 U. S., 509.
Jones v. *Estate of Keep*, 19 Wis., 390.

III.

A STATE HAS NO POWER, EITHER DIRECTLY OR INDIRECTLY, BY TAXATION OR OTHERWISE, TO INTERFERE WITH ANY OF THE MEANS, INSTRUMENTALITIES OR AGENCIES USED BY THE FEDERAL GOVERNMENT IN THE EXERCISE OF ITS SOVEREIGN POWERS.

McCulloch v. *Maryland*, 4 Wheat., 316.
Weston v. *Charleston*, 2 Peters, 449.
Dobbins v. *Commissioners*, 16 Peters, 449.
Telegraph Co. v. *Texas*, 105 U. S., 460, 466.
Palfney v. *Boston*, 101 Mass., 329.
Newark v. *Assessor*, 30 N. J. L., 13, 17.
Nave v. *King*, 27 Ind., 356.
1 Desty on Taxation, p. 73.

CONVERSELY, THE FEDERAL GOVERNMENT CANNOT INTERFERE, BY TAXATION, WITH THE MEANS, INSTRUMENTALITIES OR AGENCIES USED BY THE STATE IN THE EXERCISE OF ITS SOVEREIGN POWERS.

Collector v. *Day*, 11 Wall., 113.
U. S. v. *Railroad Co.*, 17 Wall., 327.
State v. *Garton*, 32 Ind., 6.
Warren v. *Paul*, 22 Ind., 281.
Sayles v. *Davis*, 22 Wis., 217.
Fifield v. *Close*, 15 Mich., 505.
McGovern v. *Hoesback*, 53 Pa., 176.
Sampson v. *Barnard*, 98 Mass., 359.
Starneman v. *Smith*, 100 Fed. Rep., 600.
Warwick v. *Bettman*, 102 Fed. Rep., 127, affirmed 108 Fed. Rep., 46, 6th C. C. A.
U. S. v. *Owens*, 100 Fed., 70.
Daly v. *Chicago*, 31 Chicago Legal News, 247.

ARGUMENT.

I.

THE BONDS IN QUESTION ARE EXPRESSLY EXEMPTED FROM TAXATION BY SECTION 17 OF THE WAR REVENUE ACT OF JUNE 13, 1898.

The question before the court involves the construction of sections 7, 17 and a part of schedule "A" of the war revenue law of 1898. The bonds in question are given pursuant to the laws of the State of Illinois and the ordinances of the City of Chicago.

Section 7 of the war revenue act of 1898, under which this defendant was indicted, is as follows:

"Sec. 7. That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document, or paper, of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, and without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document or paper as aforesaid shall not be competent evidence in any court."

Section 17, under which we contend that the bonds in question are exempted, is as follows:

"Sec. 17. That all bonds, debentures, or certificates of indebtedness issued by the officers of the United States government, or by the officers of any state, county, town, municipal corporation or other corporation exercising the taxing power, shall be, and hereby are, exempt from the stamp taxes required by this act: Provided, *that it is the intent hereby to exempt from stamp taxes imposed by this act, such state, county, town, or other municipal corpora-*

tions in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing or municipal capacity; Provided further, that stock and bonds issued by co-operative building and loan associations whose capital stock does not exceed ten thousand dollars, and building and loan associations or companies that make loans only to their shareholders, shall be exempt from the tax herein provided."

The first proviso in the above section clearly shows that Congress recognized the constitutional limitations upon the Federal government to interfere by taxation, with state or municipal functions of government, or any of their agencies, or instrumentalities, by exempting "from the stamp taxes imposed by this act" bonds required and used by the state in the exercise of its functions of sovereignty, viz., that of the collection of revenue and that of the enforcement of the police power of the state.

The proviso in question is substantially like that contained in the revenue act of 1864 (13 Stat. at Large, 258).

It was contended below that the bonds in question are liable to taxation by virtue of a certain part of schedule "A," section 25, which is as follows:

"Bond: For indemnifying any person or persons, firm or corporation who shall have become bound or engaged as surety for the payment of any sum of money, or for the due execution or performance of the duties of any office or position, and to account for money received by virtue thereof, *and all other bonds of any description*, except such as may be required in legal proceedings, not otherwise provided for in this schedule, fifty cents."

It was urged that the bonds in question are subject to taxation under the phrase "all other bonds of any description." It is submitted that this general clause includes only such bonds as Congress has the right to legally tax. It will not be presumed that Congress intended to include in the above general clause a subject of taxation which it had no constitutional power to tax.

9

A

THE WAR REVENUE ACT OF JUNE 13, 1898, SHOULD BE STRICLTY CONSTRUED AS AGAINST THE GOVERNMENT.

It is well settled that the stamp laws, being in restraint of common right, should receive a strict construction.

In *United States* v. *Isham*, 17 Wall., 496, 504, the court in construing the revenue act of June 30, 1864 (13 Stat. at Large, p. 298, amended July 13, 1866, 14 Stat. at Large, 144), said:

"If there is a doubt as to the liability of an instrument to taxation the construction is in favor of the exception because * * * a tax cannot be imposed without clear and express words for that purpose."

This doctrine was reaffirmed by this court in *Hartranft* v. *Wiegmann*, 121 U. S., 609,616, and *American Net & Twine Co.* v. *Worthington*, 141 U. S., 468,474.

In *Hugus* v. *Strickler*, 19 Ia., 413, 416, the court, in construing the same act, said:

"The recognized rule of construing penal statutes strictly, *and giving a liberal interpretation to words of exception contained therein*, should, in our opinion, be applied to our stamp laws. They are directly penal and clearly in restraint of common right."

In Ash's Annotated Internal Revenue Laws, p. 360, note C, the author lays down the same rule in similar language, and supports the same by numerous authorities.

B.

THERE IS EXCEPTED BY NECESSARY IMPLICATION THOSE CASES TO WHICH A STATUTE CANNOT CONSTITUTIONALLY APPLY.

In Endlich on the Interpretation of Statutes, Sec. 179, p. 247, it is said:

"'It is a safe and wholesome rule to adopt the restricted construction of a statute, when a more liberal one will bring us in conflict with the fundamental law;' indeed to regard as excepted by necessary implication from even the most express and absolute general provisions all cases to which a statute cannot constitutionally apply."

In Opinion of Justices, 41 N. H., p. 553, in response to a request of the state legislature to give their opinion upon the constitutionality of an act entitled "An Act to secure freedom and the rights of citizenship to persons in this state," the Supreme Court of New Hampshire said:

"If the act would constitutionally apply to a large class of cases that do and will exist, it would not be rendered unconstitutional by the fact that, *literally construed*, its language might be broad enough to extend to a few exceptional cases where it could not constitutionally apply; *since upon settled principles of construction, the latter are as fully and effectually excepted by necessary implication, as if the statute had contained an express proviso that it should not extend or apply to such cases.* The rule of construction universally adopted is, that when a statute may constitutionally operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the constitution, it is not to be held unconstitutional merely because there may be persons to whom or cases in which it cannot constitutionally apply; but it is to be deemed constitutional, and to be construed not to apply to the latter persons or cases, on the ground that courts are bound to presume that the legislature did not intend to violate the constitution."

In *Prather* v. *Pritchard*, 26 Ind., 65, the court had under consideration schedule B of the revenue act of June 30, 1864 (13 Stat. at Large, p. 298). The question in that case was whether or not a notarial certificate attached to a deposition was included in the designation, "certificate of any other description than those specified." The court held that though the language quoted was broad enough to include the certificate in question, still it was of the opinion that it was not the intention of Congress to impose a tax on such certificate as it was used in a legal proceeding.

II.

THE BONDS IN QUESTION ARE REQUIRED BY THE LAWS AND ORDINANCES REGULATING THE SALE OF INTOXICATING LIQUORS AND ARE THEREFORE INSTRUMENTALITIES OF THE STATE.

If it could be successfully contended that the phrase "all other bonds of any description," as used in schedule "A," is broad enough to and does include bonds exacted by the state and municipality in the administration of the liquor laws, and that the same are not exempt under section 17 above quoted, then such tax is unconstitutional, for the reason that it unlawfully interferes with the state and municipality in the exercise of governmental functions.

The giving of the bonds by the applicant for a liquor license is expressly made a condition precedent to the granting of the license.

A.

THE STATE HAS THE SUPREME AND ABSOLUTE CONTROL OF THE ISSUING AND GRANTING OF LIQUOR LICENSES FOR THE SALE OF INTOXICATING LIQUORS WITHIN ITS BORDERS UNHAMPERED BY RESTRICTIONS OF THE FEDERAL GOVERNMENT.

That the state has absolute and complete control of the sale of intoxicating liquors within its borders, and has the right to grant licenses upon such terms and conditions as it sees fit to impose, free from restrictions of the Federal government, cannot be controverted.

In License Cases, 5 How., 504, the court (TANEY, C. J.), in discussing the power of the state to regulate and control the liquor traffic, said on page 574:

"It is equally clear that the power of Congress over the subject does not extend further than the regulation of commerce with foreign nations and among the several states; and that beyond these limits, the states have never surrendered their power over trade and commerce, and may still exercise it, *free from any controlling power on the part of the general government.* Every state, therefore, may regulate its own internal traffic, according to its own judgment and upon its own views of the interest and well-being of its citizens."

And again on page 577:

"If any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether."

This doctrine is approved and upheld in *Mugler* v. *Kansas*, 123 U. S., 623; *Kidd* v. *Pearson*, 128 U. S., 116, and *Giozza* v. *Tiernan*, 148 U. S., 657, 662.

In the case of *In re Hoover*, 30 Fed. Rep., 51, 55, the court in discussing the power of the state to regulate the liquor traffic, said:

"Now, if the state may prohibit the sale of liquor altogether, since it is clearly not a 'privilege or an immunity' in the meaning of the constitution, may it not authorize the sale on such terms, by such persons, and at such places as it thinks proper? * * * This power is inseparable from the sovereignty of the state. The powers of the courts of the general government have nothing to do with it. It is a local regulation, and relates exclusively to the internal police of the state."

In pursuance of this power, laws and ordinances have been passed by the legislature of Illinois and by the municipal government of Chicago, respectively regulating the sale of and traffic in intoxicating liquors.

Under section 1 of article 9 of the constitution of Illinois, among other things it is provided:

"The General Assembly shall have power to tax * * * liquor dealers," etc.

1 Starr & Curtis's Ann. Stats. of Illinois, p. 165, 2nd Ed.

Under paragraph 63 of article 5, chapter 24, of the statutes of Illinois, concerning cities (1 Starr & Curtis's Annotated Statutes of Illinois, p. 689, 2nd Ed.), it is provided:

"Par. 63, Sec. 1. The city council in cities, and president and the board of trustees in villages, shall have the following powers: * * *

"Licenses—*Fourth.* To fix the amount, terms and manner of issuing and revoking licenses. * * *

License, Regulate and Prohibit Sale of Intoxicating Liquor—*Forty-sixth.* To license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such

license: * * * provided, further, that in granting licenses, such corporate authorities shall comply with whatever general law of the state may be in force relative to the granting of licenses. * * *

* * * *Ninety-sixth.* To pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper."

In 2 Starr & Curtis's Annotated Statutes of Illinois, Chap. 43, p. 1586, 2nd Ed., being the act regulating dramshops, it is provided by Sec. 1:

"That a dramshop is a place where spirituous or vinous or malt liquors are retailed by less quantity than one gallon, and intoxicating liquors shall be deemed to include all such liquors within the meaning of this act."

Sec. 2 provides:

Whoever, not having a license to keep a dramshop, shall, by himself or another, either as principal, clerk or servant, directly or indirectly, sell any intoxicating liquor in any less quantity than one gallon, or in any quantity to be drank upon the premises, or in or upon any adjacent room, building, yard, premises or place of public resort, shall be fined not less than twenty dollars ($20) nor more than one hundred dollars ($100), or imprisoned in the county jail not less than ten nor more than thirty days, or both, in the discretion of the court.

Sec 5 provides:

"*No person shall be licensed to keep a dramshop* or to sell intoxicating liquors by any county board, or *the authorities of any city*, town or village, *unless he shall first give bond in the penal sum of* $3,000, *payable to the People of the State of Illinois*, with at least two good and sufficient sureties, freeholders of the county in which the license is to be granted, to be approved by the officer who may be authorized to issue the license, conditioned that he will pay to all persons all damages that they may sustain either in person or property, or means of support, by reason of the person so obtaining a license selling or

giving away intoxicating liquors. The officer taking such bond may examine any person offered as security upon any such bond, under oath, and require him to subscribe and swear to his statement in regard to his pecuniary ability to become such security. Any bond taken pursuant to this section may be sued upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away any intoxicating liquor by the person so licensed, or by his agent or servant."

The Revised Code of Chicago, 1897, Vol. 1, Chap. 39, section 1175, provides:

"The mayor of the City of Chicago shall, from time to time, grant licenses for the keeping of dramshops within the City of Chicago to persons who shall apply to him in writing therefor, and shall furnish evidence satisfying him of their good character. *Each applicant shall execute to the City of Chicago a bond*, with at least two sureties, to be approved by the city clerk or city collector, in the sum of five hundred dollars, *conditioned that the applicant shall faithfully observe and keep all ordinances* in force at the time of the application or thereafter to be passed during the period of the license applied for, and will keep closed on Sundays all doors opening out upon any street from the bar or room where such dramshop is to be kept; and that all windows opening upon any street from such bar or room shall, on Sundays, be provided with blinds, shutters or curtains, so as to obstruct the view from such street into such room. *No application for a license shall be considered until such bond shall have been filed.*"

The conditions of the bond in the sum of $3,000 to the People of the State of Illinois are substantially in the words of the statute (Rec., 14).

The conditions of the saloon bond, in the sum of $500, to the City of Chicago, are even stronger and more comprehensive than the language of the Municipal Code. (Rec., 3.)

It is thus apparent that these bonds are required by

and given in pursuance of the laws and ordinances regulating dramshops. Their purpose is to insure to the people of the state a means for the proper enforcement of the dramshop laws, and with the added guaranty of two resident sureties insure a prompt payment of all fines and penalties imposed for violations of the liquor laws. They furnish also a remedy for those who are damaged either in person or property, or means of support, through the sale of intoxicating liquors, and are a powerful means to compel the dramshop keeper to respect and obey the law. They are conditioned for a due observance of all laws and ordinances respecting dramshops. The sale of intoxicating liquor may be productive of evil results, and may be the cause of an increase of crime, pauperism, idleness and vice. It is, therefore, necessary, for the protection of the people, that the legislature should make regulations and impose conditions upon the granting of dramshop licenses. This legislation is an exercise of the police power for the safety, welfare and health of the community. What conditions shall be imposed upon the issuance of dramshop licenses rests within the discretion of the legislature. The legislature has seen fit to require the applicant for a dramshop license to tender a bond to the state before a license can be obtained. The giving of the bond is a condition precedent to the issuing of a license. The bond is given as a protection to the public against the evils which result from the liquor traffic, and runs in favor of the people, and in case of breach is enforcible in the name of the people. It cannot be disputed that the granting of a license is the exercise of a governmental function which it is beyond the power of the Federal government to tax. The application for a license and the granting of the same by the state constitute a

contract between the state and its licensee. The bond is therefore as much a part of the contract as is the license, it being a condition precedent to the granting of the license. They are part and parcel of the same transaction. If the license is exempt from taxation, the bond which is a part of the license and which is just as essential to the proper regulation of the liquor traffic as the license, is exempt, upon the same grounds. But even if the bond could not be considered a part of the license, the fact would remain that the bonds are required by the state in the exercise of its police power in controlling and regulating what is commonly regarded as a dangerous business.

In *United States* v. *Owens*, 100 Fed., 70, Judge Adams in the Eastern District of Missouri, in a case precisely like the one at bar, said:

"The act of Missouri referred to in the condition of the bond is a recognition of a well-known fact, of which courts may properly take judicial cognizance, that the liquor traffic is an evil which cannot be suppressed, but which may be regulated and kept within less harmful limits. * * * Upon the execution of such a bond, a license is granted by the state. This legislation is one of the highest expressions of the exercise of the police power of sovereignty residing in the state. It deals with a subject intimately related to the health, welfare and safety of the people, and is the subject-matter of exclusive cognizance by the state, with the exercise of which, outside of certain limitations not necessary to be now stated, the Federal government cannot interfere. *Mugler* v. *Kansas*, 123 U. S., 623.

In this legislative scheme the giving of the bond is a condition to the granting of the license. The license itself does not express the entire contract between the state and the dramshop keeper. It is only that term of the contract expressive of the act of the state,. The other term is found in the bond itself, which expresses the assent of the applicant for the license, to the condition imposed by the state. The

two, taken together, constitute the contract or license, with all its limitations and conditions. * * *

The proposition that the saloon business is not itself a governmental agency may readily be conceded, but it does not follow, and cannot be true, that the means adopted by the state for the regulation of this business, in the way of throwing safeguards about it for the public welfare, are not governmental agencies. They in my opinion clearly fall within the reserved power of the state to legislate in the exercise of its police power for the safety, welfare and health of the community, and as such are not taxable by the federal government.

It is conceded that the state's license to a dramshop keeper cannot be taxed. This concession, in my opinion, ends the case. The bond, as already seen, is a part of the license; it is the assent to the condition on which the license is granted; it is the agreement of the party of the second part to the terms of the grant; it is a compliance with the provisions of the act of the state, to furnish security for the safe conduct of a dangerous business. But whether the bond be treated as a part of the license or not, it must, in my opinion, be regarded as a means or instrumentality employed by the state in the execution of one of its most important functions, namely, preserving the peace, and enforcing its laws relating to the health, safety and morals of its citizens, and as such cannot, on the authority of cases cited, be the subject of taxation by the federal government."

In *People ex rel. Daly* v. *City of Chicago*, 31 Chicago Legal News, 247, Judge Tuley, of the Circuit Court of Cook County, Illinois, had under consideration the question here in controversy. In that case it was held that the state could not refuse to issue a license because a revenue stamp had not been affixed to the bond required by the laws and ordinances of the state and municipality as a condition precedent to the issuance of a dramshop license. The court said;

"The attempt on the part of the national government to exact a stamp tax of fifty cents upon the bond is an unwarrantable interference with the internal government of the

City of Chicago and State of Illinois; in other words, with the exercise of state sovereignty.

The power of taxation in the United States government is a limited power, and a recognized limitation is, under the authorities, that it cannot, by any kind of taxation, stamp or other tax, interfere with or burden the carrying on of either state or municipal governments, exercising the sovereign power of the state. It is no answer to say that this is not a tax on the state, or a tax on the city, or upon any state or city official, and that there is no prohibition in the internal revenue law as to the actions and as to the conduct of the state or city officials in the premises; but the internal revenue law does say to the citizens—this revenue act, imposing the fifty-cent tax, does interfere with the working of the state and municipal machinery. It says to the citizen, you shall not receive a license from the state or municipality for the carrying on of your business, although you may have complied with all state and municipal regulations, until you have first complied with the United States law by placing a revenue stamp on your bond. If the United States government can impose a tax of fifty cents on a bond as a condition precedent to the citizen receiving a license, it can impose a tax of $5,000 on each bond, or any other sum that Congress may deem proper to impose, and may make it so burdensome upon the applicant for a license as to prevent the state exercising its sovereign power of licensing occupations or business for police or revenue purposes."

B.

THE WAR REVENUE ACT OF JUNE 13, 1898, IMPOSES EXCISE TAXES ON TRANSACTIONS, IRRESPECTIVE OF WHO IN THE FIRST INSTANCE IS REQUIRED TO PAY THE SAME.

It may be suggested here as it was in the court below that, inasmuch as the stamp tax is required to be paid in the first instance by the person executing the bond, and placed thereon before the same is tendered, the tax is laid, not upon the bond but upon

the individual who gives the bond; in other words, that the bond does not become an instrumentality of government until the stamp has been placed thereon. If the taxes in question were imposed upon the individual who gives the bond, there might be some force to this contention. But the stamp tax is neither a property nor a capitation tax, and cannot be constitutionally so regarded, as it would violate the constitutional provisions as to uniformity of taxation. The tax is laid upon the transaction and affects all parties to it, irrespective of who in the first instance is required to pay it.

In *Telegraph Co.* v. *Texas*, 105 U. S., 460, this court said:

"Where the burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury."

In *Nichol* v. *Ames*, 173 U. S., 509, this court had under consideration section 6 and a part of schedule "A" of the war revenue act of 1898, which imposed a stamp tax "on memorandums or agreements of sale made at any exchange or board of trade." It was contended that the tax was a direct tax, and therefore illegal, because not apportioned as required by the constitution. It was held, however, that the tax was not a direct tax, but was a tax upon the transaction itself, and therefore affected all parties to it.

In *Jones* v. *Estate of Keep*, 19 Wis., 390, the court in discussing the power of Congress to impose a tax on judicial process issued by the state courts said:

"It has been suggested that this tax upon state process might be sustained on the ground that it was really a tax upon the party appealing to the court for redress. He is undoubtedly the person most immediately interested in

the judicial proceedings, and the tax is paid by him. But this circumstance does not render the tax any the less obnoxious to the objection taken to it. It is still a direct tax upon the means employed by the state courts to administer justice."

III

A.

A STATE HAS NO POWER, EITHER DIRECTLY OR INDIRECTLY, BY TAXATION OR OTHERWISE, TO INTERFERE WITH ANY OF THE MEANS, INSTRUMENTALITIES OR AGENCIES USED BY THE FEDERAL GOVERNMENT IN THE EXERCISE OF ITS SOVEREIGN POWERS

The bonds in question being part of the machinery adopted by the state and the municipality for the proper enforcement of the dramshop laws, they are therefore instrumentalities of government which it is beyond the power of Congress to impede or interfere with by taxation or otherwise. It has been the established law of this country, ever since the decision of Mr. Chief Justice MARSHALL in *McCulloch* v. *Maryland*, 4 Wheat., 316, which decision has been followed by an unbroken line of authorities down to the present time—that it is beyond the power of the state to interfere by taxation or otherwise with the instrumentalities adopted by the Federal government in the exercise of its sovereign powers.

On page 431 of the opinion the Chief Justice said:

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect

to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

* * * * *

"If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states.

* * * * *

"The result is a conviction that the states have no power by taxation or otherwise to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

In *Weston* v. *City Council of Charleston*, 2 Peters, p. 449, Mr. Chief Justice MARSHALL, in denying the power of the City of Charleston to impose a tax upon stock issued for loans made to the United States, on page 464 said:

"The stock it issues is the evidence of a debt created by the exercise of this power. *The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force.* The power operates upon the contract the instant it is framed, and must imply a right to affect that contract.

"If the states and corporations throughout the Union possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?"

In *Dobbins* v. *Commissioners*, 16 Peters, 435, the court denied the power of the county commissioners of a state to levy a tax on an officer of the United States on the in-

come of his office. In that case it was contended, inasmuch as the tax was laid on the income of the officer, that the tax was a personal charge, and was, therefore, not laid upon an instrumentality of government. In answering this contention, the court, on page 446, used the following language:

"* * * And the only sense in which a tax is a personal charge is, that it is assessed upon personal estate, and the profits of labor and industry. It is called a personal charge, to distinguish such a tax from the tax upon lands and tenements, which are enforced without any regard to the persons who are the owners. Taxes are never assessed, unless it be a capitation tax, upon persons as persons, but upon them on account of their goods, and the profits made upon professions, trades and occupations."

And again on page 448 it was said:

"Congress has power to lay and collect taxes, duties, imposts, etc., and to regulate commerce with foreign nations and among the several states, and with the Indian tribes. Neither can be done without legislation. A complicated machinery of forms, instruments, and persons, must be established; revenue districts were to be designated; collectors, naval officers, surveyors, inspectors, appraisers, weighers, measurers and gaugers must be employed; 'the better to secure the collection of duties on goods and on the tonnage of vessels,' revenue cutters, and officers to command them, are necessary. The latter are declared to be officers of the customs, and they have large powers and authority. All of this is legislation by Congress to execute sovereign powers. They are the means necessary to an allowed end; the end, the great objects which the constitution was intended to secure to the states in their character of a nation. Is the officer, as such, less a means to carry into effect these great objects than the vessel which he commands, the instruments which are used to navigate her, or than the guns put on board to enforce obedience to the law. These inanimate objects, it is admitted, cannot be taxed by a state, because they are means. Is not the officer more so who gives use

and efficacy to the whole? Is not compensation the means by which his services are procured and retained? * * * *To allow such a right of taxation to be in the states would also in effect be to give the states a revenue out of the revenue of the United States, to which they are not constitutionally entitled, either directly or indirectly; neither by their own action, nor by that of Congress.*"

In *Telegraph Co.* v. *Texas*, 105 U. S., p. 460, the court had under consideration a law of the State of Texas which imposed a tax on telegraph messages. The court, by Mr. Chief Justice WAITE, on page 466 said:

"As to the government messages, it is a tax by the state on the means employed by the government of the United States to execute its constitutional powers, and therefore void. It was so decided in *McCulloch* v. *Maryland* (4 Wheat., 316), *and has never been doubted since.*"

In *Palfney* v. *City of Boston*, 101 Mass., 329, the defendant, who was engaged in the business of selling internal revenue stamps procured by him of the government of the United States, was sued by the City of Boston for the amount of a tax which was assessed upon his stock in trade. The court decided that the stamps in question were not subject to taxation, and said, page 333:

"The property which constituted the stock in trade of the planitiff, and upon which the tax was imposed, consisted entirely of internal revenue stamps. These are instruments of the general government for the performance of its legitimate functions. They themselves represent the tax which that government levies upon the business of the community, for its own support. They are the drafts by which that tax is received in advance, and the vouchers by which its payment is made manifest. It is their capacity to answer these purposes which gives them value as property. They have no value otherwise. We think it clear, therefore, that as property, they are exempt from all state and local taxation."

In *Newark City Bank* v. *The Assessor*, 30 N. J. L., p. 13,

it was held that bonds issued by the United States were not subject to taxation by a state in the hands of individuals. The court, on page 17, said:

"It cannot be taxed at all because it is the contract of the national government, which, as to this, is paramount to that of the state over the same citizens. *A taxation of the contract is an indirect taxation of the parties to it.*"

In *Nave* v. *King*, 27 Indiana, p. 356, it was held that county orders issued in payment of soldiers' bounties were not required to be stamped. The court on page 359 said:

"It is claimed that the county orders are void because they were issued without a revenue stamp. It never was claimed by the government that such orders were embraced in any revenue law of Congress and by the act of July 13, 1866, it is expressly provided 'that all official instruments, documents, and papers issued by the officers of the United States government, or by the officers of any state, county, town, or other municipal corporation, shall be, and hereby are, exempt from taxation; *provided*, that *it is the intent hereby to exempt from liability to taxation such state, county, town, or other municipal corporation, in the exercise only of functions strictly belonging to them in their ordinary governmental and municipal capacity.*' Acts 1st Sess. 39th Cong., 147."

B.

CONVERSELY, THE FEDERAL GOVERNMENT CANNOT INTERFERE, BY TAXATION, WITH THE MEANS, INSTRUMENTALITIES OR AGENCIES USED BY THE STATE IN THE EXERCISE OF ITS SOVEREIGN POWERS.

The converse of the rule, which inhibits the states from interfering with the machinery of the Federal government, is equally true as applied to the operations of the state governments. The Federal government cannot interfere with the state governments by imposing a tax on the means

and methods adopted by the states for the proper enforcement of their laws.

In *Collector* v. *Day*, 11 Wall., p. 113, Mr. Justice Nelson in discussing the power of Congress to impose a tax on a salary of an officer of a state, after a review of the cases, said on page 124 *et seq.:*

"And we shall now proceed to show that, upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of the judicial officer of a state. * * * The constitution guarantees to the states a republican form of government and protects each against invasion or domestic violence. Such being the separate and independent condition of the states in our complex system, as recognized by the constitution, and the existence of which is so indispensable that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the *means* and *instrumentalities* employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax.

* * * * *

The two governments are upon an equality, and the question is whether the power 'to lay and collect taxes' enables the general government to tax the salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the state? * * * In respect to the reserved powers, the state is as sovereign and independent as the general government. *And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-*

preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

This doctrine was approved and applied in *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S., 489, 584, where the court said:

"As the states cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the constitution to tax either the instrumentalities or the property of a state.

A municipal corporation is the representative of the state and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subjects of Federal taxation. *Collector* v. *Day*, 11 Wall., 113, 124; *United States* v. *Railroad Co.*, 17 Wall., 322, 332. In *Collector* v. *Day* it was adjudged that Congress had no power even by an act taxing all incomes to levy a tax upon the salaries of judicial officers of a state, for reasons similar to those on which it had been held in *Dobbins* v. *Commissioners*, 16 Pet., 435, that a state could not tax the salaries of officers of the United States."

In *United States* v. *Railroad Company*, 17 Wall., 322, the court, in discussing the power of Congress to impose

a tax upon an instrument evidencing a debt due the City of Baltimore, on page 327 said:

"The right of the states to administer their own affairs through their legislative, executive and judicial departments, in their own manner, through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and *instruments*, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other.

* * * * *

A municipal corporation like the City of Baltimore is a representative not only of the state, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state."

In *State* v. *Garton*, 32 Ind., p. 1, it was held that Congress had no power to impose a tax on the official bond given by an officer of the state to secure a faithful performance of his duty. Said the court, on page 3:

"If a state is to exist as a sovereign, it must of necessity have the power to select its agents to execute its laws, and must be empowered to exact from them such pledge for the faithful discharge of their duties as may seem best calculated to secure their performance. In exacting such security, it must be as independent of all control *as in enforcing the condition of the bond when forfeited.*"

And on page 5:

"And may we not respond, that if the national government may tax—nay more—may declare 'invalid and of no effect' the official bond executed to the state from its own citizen selected by it to execute its own laws, may the national government not also tax the issue of a warrant from the state auditor upon the state treasurer, the signing of a pardon by the governor, his approval of a bill,

the passage of the very bill itself by the legislature, the decisions of our judges, the process of our courts? Nay, it did tax that process. This, then, 'is not a case of confidence,' but of construction of a constitution which is over and above both national and state governments."

And again on page 7:

"This power of taxation, existing alike in the general government and in the states, coextensive and concurrent, by virtue of the sovereignty of each, has, then, for each this limit: *Neither* may tax, because neither may take away, the legitimate machinery or agencies employed by the other in the exercise of its governmental powers and functions.

The principle which operates as a limitation upon the power of the state to tax the agencies and minute machinery employed by the general government to carry out its constitutional functions, must in turn equally restrain the power of Congress to tax, to trammel, or destroy, the means used by the state to perpetuate an existence as sacred under the constitution as the national life, because a constituent of that life."

In *Sayles* v. *Davis*, 22 Wis., 217, it was held that Congress could not impose a stamp duty on a tax deed executed under the laws of a state, the court saying on page 220:

"As to the omission to affix an internal revenue stamp to the tax deed under which the plaintiff claims, we think such stamp was unnecessary. * * * We are of opinion that Congress possesses no constitutional power, without the assent of the states, to tax the means or instruments devised by the states for the purpose of collecting their own revenues; and for our reasons in the support of this conclusion, we refer to the opinion of this court in the case of *Jones* v. *Estate of Keep*, 19 Wis., 369. If the writs and judicial proceedings in the courts of the state cannot be taxed by Congress, it requires no argument to show that the proceedings of the state to collect its own revenue cannot be so taxed."

In *Fifield* v. *Close*, 15 Mich., 505, the court had under consideration an act of Congress which imposed a tax on

process in the state courts. The act was held unconstitutional. The court on page 506 said:

"Having this unqualified discretionary power to tax to any extent whatever is taxable, that power may easily be extended far enough to destroy anything on which burdens may be imposed, by making those burdens so heavy as to become prohibitory. * * * The argument that such prohibitory action is improbable has no force whatever in determining the existence or non-existence of the power. There is no legitimate power possessed by any legislature which it may not lawfully carry to an extreme, where extreme action is deemed expedient by the majority of the members. And where a power of destruction has been conferred, it is always possible that it may be exercised, although it may be very improbable."

In *Warren* v. *Paul*, 22 Ind., 276, the right of the Federal government to tax the process of state courts was again denied in the following language (p. 279):

"The Federal government must be limited in its right to lay and collect stamp taxes, to the citizens and their transactions as such, or as acting in the Federal government, officially or otherwise; and cannot be laid upon and collected from individuals on their proceedings when acting not as citizens, transacting business with each other as such, but officially, or in the pursuit of rights and duties in and through state official agencies and institutions."

In *McGovern* v. *Hoesback*, 53 Pa., 176, an action of debt was instituted, and one of the defendants was arrested at the instance of the plaintiff. The court discharged this defendant upon his giving bond to the plaintiff for his appearance at the next term of court, and presenting his petition for the benefit of the insolvent laws. Subsequently the plaintiff offered the insolvent bond in evidence, and it was objected that the bond was not stamped. The court in passing on this objection, said:

"As to the second objection, that the bond was not stamped, it is sufficient to say that the stamp act exempts from duty all bonds that are made necessary in legal proceedings. It was argued that an insolvent bond is *ex voluntate* and not *ex necessitate*, but we do not think so. Arrested upon judicial process and liable to be thrown into jail, the debtor gives the bond to avert the legal effect of the process and to secure to himself his liberty. In a very high sense, this is a necessity created by legal proceedings, and such a bond may be fairly considered as falling within the exception of the stamp act."

And in *Sampson* v. *Barnard*, 98 Mass., 359, it was held that a bond given to dissolve an attachment did not require a stamp under the revenue act.

One of the latest expressions of the courts on the question is found in *Stirneman* v. *Smith*, 100 Fed. Rep., p. 600, decided by the Circuit Court of Appeals for the Eighth Circuit on February 23, 1900. It was there held that a revenue stamp need not be affixed to a notarial certificate attached to depositions to be used as evidence before a judicial tribunal. The opinion in part is as follows:

"In the proviso last quoted is found an explicit declaration on the part of Congress that it was not its purpose to impose a stamp tax on any instruments or documents which might at any time be executed for or in behalf of a state, county, town, or other municipal corporation, to enable it to perform its ordinary governmental or municipal functions; and, if there had been no such a declaration, the same result would doubtless have been reached by judicial construction. In the absence of a definite expression on that subject, it would have been inferred, we think, that Congress intended to exempt from taxation all the instrumentalities that a state or any of its municipal subdivisions might find it expedient to employ in the discharge of their ordinary governmental functions; *and that its purpose was to impose stamp taxes on those instruments only which have their origin in the private transactions of individuals and corporations, or to such instruments and writings as are executed mainly for their benefit, rather than for the benefit of the public. Car-*

penter v. *Snelling*, 97 Mass., 452, 458; *Green* v. *Holway*, 101 Mass., 243; *Knox* v. *Rossi* (Nev.), 57 Pac., 179, and cases there cited."

And in *Warwick* v. *Bettman*, 102 Fed. Rep., 127, decided May 5, 1900, it was held that a bond given by a notary public conditioned for the faithful discharge of the duties of his office was not required to be stamped; it being exempt under section 17 of the war revenue act. The opinion in part is as follows:

"The tax collected from the plaintiff was a tax on his right to qualify, in conformity with the law of Ohio, for the office to which he had been appointed, and was a restraint upon his duty to qualify, which might be made practically prohibitive, and was a restraint upon the state in the exercise of its function in the appointment and qualification of its officers and agents for ordinary governmental purposes, and was therefore illegal."

This case was affirmed in the Court of Appeals, Sixth Circuit, March 5, 1901. (108 Fed. Rep., 46.) The court said:

"A tax exacted upon a bond required by the state from an official as a prerequisite to the exercise of the duties of the office is in necessary legal effect a tax upon the appointee's legal right to qualify as an official of the state."

In the case at bar a tax upon a saloon bond is necessarily a tax upon the license, as the giving of the bond is a prerequisite to the granting of the license. The statute expressly provides that no license shall be granted "*unless he shall first give bond in the penal sum of* $3,000," etc. And the ordinance of Chicago says that "*no application for a license shall be considered until such bond shall have been filed.*" It will not be contended that the Federal government has the power to tax the license, therefore, it is equally clear that it is beyond the power of Congress to impose a tax upon the bond.

The expressed reason of a judgment is important. That expressed by the learned trial judge, it is submitted, is faulty. Judge Seaman admits that the argument that the bonds " 'are necessary means or instrumentalities for the exercise of the functions of state or municipal government' is not without force," and several authorities are cited to that effect. The court, however, without referring to or considering any authority, reasons that because "the business of saloon-keeping is neither a governmental "function nor essential to its administration," therefore, the bond is subject to a stamp tax. And the court adds that the bond "is the applicant's individual undertaking to obtain a personal privilege," and is, therefore, not exempt. The same reasoning would subject the bond of the notary, the bond of the public official, the bond given in a replevin or attachment suit, to stamp duties Such undertakings are given "to obtain a personal privilege," but in every instance the courts, Federal and State, have held such obligations free from tax liability. Nor is it accurate to say that such undertakings are given merely "to obtain a personal privilege"; there is much more to it than "a personal privilege." The state has the exclusive right to regulate or prohibit the sale of intoxicating liquors within its borders. The constitution of Illinois expressly gives the General Assembly "power to tax * * * liquor dealers," etc. The legislature of Illinois has availed itself of this constitutional right and has passed laws providing for the taxation of the liquor traffic. The minimum annual tax is now fixed by statute at $500. There are in Illinois, approximately, 10,000 licensed dramshop keepers. The annual tax or income from them is, therefore, $5,000,000. The state is interested in collecting this revenue. In addition

to the license fee, a bond is exacted. Is it logical to say that the taxation by the Federal government of the bond is not an interference with state functions, with state taxing powers and with the exercise by the state of police authority? Does it solve the question to say that the relation created between the licensee and the state is one of mere "personal privilege" and "is in no sense the act or obligation of the public or of a representative of the public"? A debt owing to the state or municipality is not "the act or obligation" of the state or city—and yet it cannot be taxed by the Federal government. If Congress can tax the dramshop keeper's bond fifty cents, it can make the tax $5,000. The action of such a tax would completely destroy the liquor traffic in Illinois, and deprive the state of its inherent power to regulate that traffic and to tax it, and would cut off the present annual income of some $5,000,000 which goes to municipalities in the state as a consideration for granting dramshop licenses. We submit that the reasoning of Judge Seaman does not carry conviction.

Under the internal revenue laws of the United States brewers and distillers are compelled to give a bond to the United States as a condition precedent to the issuance by the government of the requisite license. If it were within the power of the state to compel the party giving such a bond to pay a tax upon it, the state would thus be enabled to absolutely prevent the collection of the revenue and the enforcement of the government regulations concerning intoxicating liquors. If the state has the power to levy a tax of 50 cents on such a bond, then it has the power to make the tax $5,000. The fact that such a proceeding is highly improbable is no answer to this contention. It is what is *possible* under such a power and not what will *probably* be

done. As Chief Justice MARSHALL observed in *McCulloch* v. *Maryland*, *supra*, it is not a case of "*confidence.*" The fact remains that if the power to tax exists, this power involves the power to destroy and render prohibitive. The present case is the converse of that proposition and the same rules should be applicable. If it rests within the power of the Federal government to impose a tax on a bond given to the state or municipality, in compliance with the dramshop law, then the Federal government has the power to absolutely prevent, by taxation, the giving of such a bond. As already shown, the giving of a bond to the people of the State of Illinois and to the City of Chicago is a necessary prerequisite to the issuing of the license, both under the laws of Illinois and the ordinances of the City of Chicago. If Congress has the power, by means of taxation, to prevent the giving of a bond, then it follows as a necessary consequence that a license to maintain a dramshop cannot be obtained without the consent of Congress. That the sale of intoxicating liquors is a business which may dangerously affect the health, morals or well-being of the citizens cannot be controverted, and a court takes judicial notice of that fact. It is, therefore, necessary to make regulations which will protect the people from the evils of such traffic and to provide means with which to properly enforce and carry into effect these regulations. The people of the State of Illinois and the municipal authorities of Chicago have seen fit to require the giving of a bond, with two good and sufficient sureties, before a license to keep a dramshop can be obtained. The bond, therefore, is as much an instrumentality of the state as is the license. The license evidences the grant of the state to keep a dramshop—the bond is the security furnished the state against a violation

of the laws and ordinances regulating the dramshop. Without the bond, the people are without civil remedy if the dramshop keeper violates the law. The liability on the bond is a potent factor in keeping the dramshop keeper within the law. The people of the state or the municipal authorities are the express obligees in the bonds; they are executed for their benefit, and the giving of the bond should be as untrammelled and as free from restrictions as the enforcement thereof. The giving of the bond can no more be considered an individual act than the giving of a bond by a public officer, conditioned for the faithful discharge of his duties as such officer. Both are given for the benefit of the people, and both are required by law. In one case the bond is a remedy for a violation of the legal duties of the official, and in the other for the violation of the dramshop laws. There is no difference in principle.

If the power to tax such a bond exists, an exercise of that power will produce the same evil effects as a tax upon the license itself. The sale of intoxicating liquors could thus be prohibited. There is no difference between a tax on such a bond and upon a liquor license,

If, therefore, the bonds in question are means or instrumentalities of the state government employed by the state or municipality to regulate the liquor traffic under the police power, then these bonds are exempt from taxation by virtue of section 17 of the revenue act above referred to.

If the bonds are taxable, under a literal construction of section 25, schedule "A," then that part of schedule "A" which imposes a tax on the bonds in question is unconstitutional, as being an interference with the instru-

mentalities of the state necessary to carry out its sovereign powers.

It is respectfully urged that the judgment of the District Court be reversed.

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No. 79.

Brf. of Atty. Gen'l

Appellee.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

PETER AMBROSINI, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 79.

ARGUMENT FOR APPELLEE.

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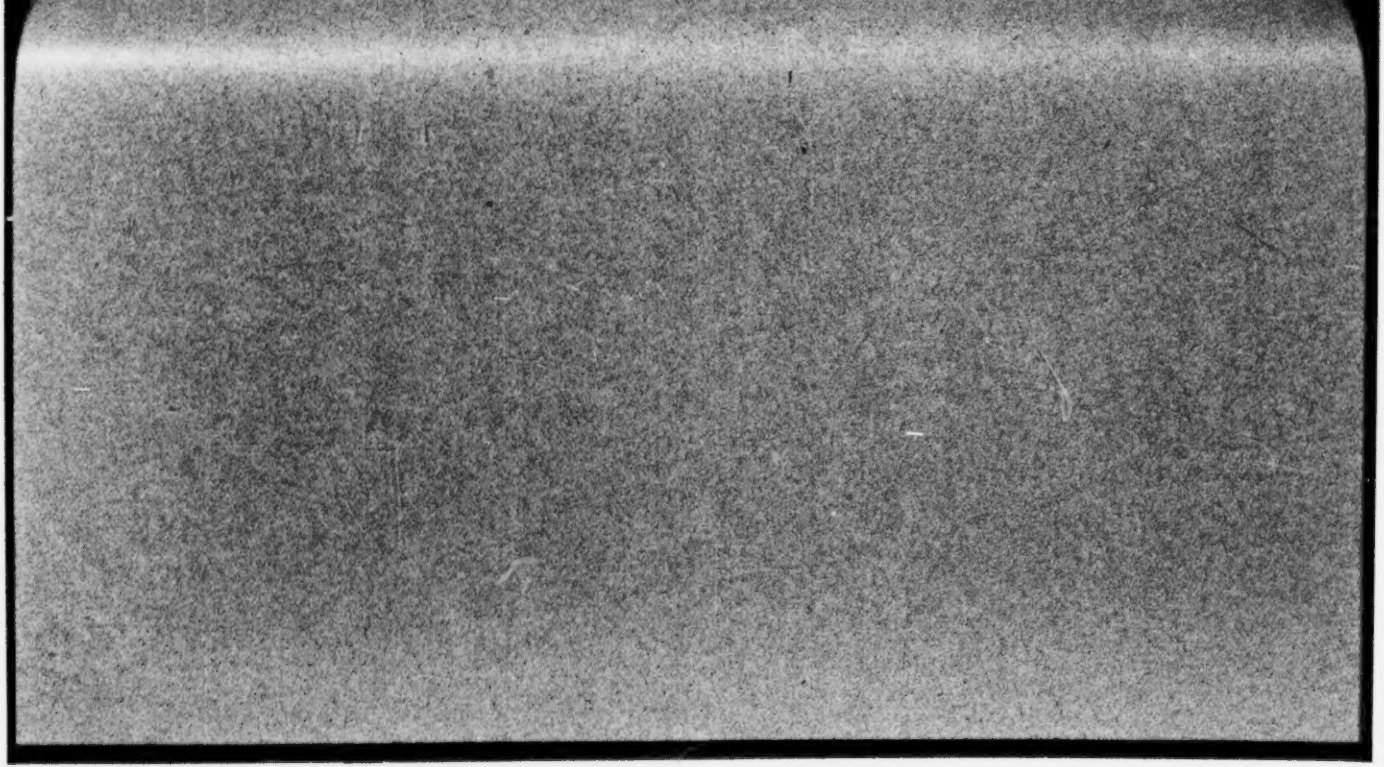

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

PETER AMBROSINI, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 79.

ARGUMENT FOR APPELLEE.

This appeal involves two questions:

(1) Is a bond, required by a State law from an applicant for a license to sell liquors, taxable under the war-revenue act of 1898?

(2) If within the purview of the act, is such taxation constitutional?

Each question will be separately considered.

I.

The war-revenue act of 1898 imposes a stamp duty upon a bond which an applicant for a license to sell liquor at retail is obliged by the law of a State or municipality to give, as a prerequisite for the issuance of such license.

Section 6 of the war-revenue act of 1898 (30 Stat. L., 448, 451) provides as follows:

> That on and after the 1st day of July, 1898, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or

certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

Schedule A of the war revenue act provides (id., 460):

Bond: For indemnifying any person or persons, firm or corporation, who shall have become bound or engaged as surety for the payment of any sum of money, or for the due execution or performance of the duties of any office or position, and to account for money received by virtue thereof, *and all other bonds of any description*, except such as may be required in legal proceedings, not otherwise provided for in this schedule, fifty cents.

Section 17 of the act provides (id., 455):

That all bonds, debentures, or certificates of indebtedness issued by the officers of the United States Government, or by the officers of any State, county, town, municipal corporation, or other corporation exercising the taxing power, shall be, and hereby are, exempt from the stamp taxes required by this act: *Provided*, That it is the intent hereby to exempt from the

stamp taxes imposed by this act such State, county, town, or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental taxing or municipal capacity. *Provided further*, That stock and bonds issued by cooperative building and loan associations whose capital does not exceed ten thousand dollars, and building and loan associations or companies that make loans only to their shareholders, shall be exempt from the tax herein provided.

It is clear that this bond is within the provisions of Schedule A, for that schedule makes the sweeping provision that "all other bonds of any description, except such as may be required in legal proceedings," must be stamped. This, in effect, makes every kind of a bond taxable except such as are expressly exempted. It is therefore only necessary to inquire whether these liquor-license bonds are within the exceptions provided in the act.

Neither of the bonds was given in the course of any legal proceedings. The licenses in question were not granted by any court, but by the executive department of the government—in one case by the county board and in the other by the mayor of the city of Chicago. The acts were therefore ministerial in nature and in no sense judicial.

The only other section under which an exemption could be claimed is the proviso of section 17, exempting "State, county, town, or other municipal corporations in the exercise only of the functions strictly

belonging to them in their ordinary governmental, taxing, or municipal capacity."

This exemption is obviously intended as a statement of a class of subjects which, under our constitutional system, the Federal Government could not tax. The present bonds were given by individuals who are in no respect connected with the Government either of the State, county, or town; the bond is not given in the exercise of any function strictly belonging to a State, county, or town. The regulation of the liquor traffic is no necessary function of government. Even if it were, the bond given by a citizen who desires a license is not an agency or instrumentality of the State, and such bond is, therefore, not within the exempted class. This will be more fully discussed as I pass to the second question.

II.

The Federal Government can constitutionally impose a stamp duty upon a liquor-license bond, given by a licensee, even when such bond is required by the law of a State or municipality as an incident to the regulation of the liquor traffic.

In the discussion of this question it should be remembered that—

(*a*) The law does not attempt to tax any direct agency of government, or any officer thereof.

(*b*) It does not require anything of anybody who represents the State government in any way.

(*c*) While it may incidentally affect an act done in pursuance of the municipal regulations of a State, yet

such municipal regulation (being in this instance the regulation of the liquor traffic) is not a direct agency of the State or any necessary function thereof.

(*d*) The tax is placed upon a bond given by an individual *before* he can secure the privilege of selling liquor. It is the act of a person and not of the Government.

The State law which requires that a dram-shop keeper shall give a bond is as follows (section 5 of the dram-shop act, Revised Statutes of Illinois, 1899, p. 723):

> *No person shall be licensed* to keep a dram shop, or to sell intoxicating liquors, by any county board, or the authorities of any city, town, or village, *unless he shall first give bond in the penal sum of $3,000*, payable to the people of the State of Illinois, with at least two good and sufficient sureties, freeholders of the county in which the license is to be granted, and to be approved by the officer who may be authorized to issue the license, conditioned that he will pay to all persons all damages that they may sustain, either in person or property, or means of support, by reason of the person so obtaining a license selling or giving away intoxicating liquors. The officer taking such bond may examine any person offered as security upon any such bond, under oath, and require him to subscribe and swear to his statement in regard to his pecuniary ability to become such security. Any bond taken pursuant to this section may be

> sued upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away any intoxicating liquor by the person so licensed, or by his agent or servant.

The other bond was given in pursuance of an ordinance of the city of Chicago, which provided as follows:

> The mayor of the city of Chicago shall, from time to time, grant licenses for the keeping of dramshops within the city of Chicago to persons who shall apply to him in writing therefor and shall furnish evidence satisfying him of their good character. Each applicant shall execute to the city of Chicago a bond, with at least two sureties, to be approved by the city clerk or city collecter, in the sum of five hundred dollars, conditioned that the applicant shall faithfully observe and keep all ordinances in force at the time of the application or thereafter to be passed during the period of the license applied for, and will keep closed on Sundays all doors opening out upon any street from the bar or room where such dramshop is to be kept; and that all windows opening upon any street from such bar or room shall, on Sundays, be provided with blinds, shutters, or curtains, so as to obstruct the view from such street into such room. *No application for a license shall be considered until such bond shall have been filed.*

It thus appears that the first bond is given for the benefit of any individual who may sustain damage by reason of any act done by the licensee. The second

bond is given to insure the faithful performance of the ordinances of the city of Chicago with reference to the sale of liquor. Both must be given before the license can be issued.

It is obvious, therefore, that both bonds are given by private citizens as mere incidents to the municipal regulation of the liquor traffic, and are therefore in no sense instrumentalities of the State government. It is within the power of the State of Illinois as a police regulation to make the sale of liquor a privilege, but such sales are equally within the taxing power of the United States. (License Tax Cases, 5 Wall., 462.) The Federal Government may license a retail dealer to sell liquor, and exact a tax, and the State may pass a prohibitory liquor law which will destroy the business, and thus reduce the revenues of the Government, but the prohibitory law is not an interference with any agency or instrumentality of the Government; it merely destroys the business of an individual, which the Federal law has seen fit to tax. Similarly, the Federal Government can tax to death the privilege of selling liquor, which the State law has, for the purposes of revenue or as a police regulation, created and given to an individual. It might not have the power to impose a stamp duty upon a license which the State government issues, for such license, being given by an officer of the State, is a direct act of the State, but the Government could impose a tax upon sales of liquor which would be so large that none could profitably engage in this calling, and this would prevent the issuance of any licenses at all. If selling liquor or

regulating the traffic were direct and necessary functions of government, neither Federal nor State government could thus interfere with each other. If the Federal Government can tax the liquor traffic to death it can impose a duty upon a bond which a saloon keeper gives as a mere incident to the regulation of his business. To hold otherwise would be to assert that any act or thing which the municipal laws of a State may require of a citizen as a municipal regulation is exempt from Federal taxation. Suppose, for example, that a State should pass a law that no title to property should pass from one citizen to another unless a deed were formally executed and recorded. The imposition of a duty on the official records which are kept by the officers of the Government would probably be void—for such official records are agencies of the Government—but such imposition on a deed which the vendor executes to the vendee, even though such deed be required by State law, is not void. To hold otherwise would be to extend the ruling in *M'Culloch* v. *Maryland* (4 Wheat., 316) far beyond its original purpose. That case is the foundation for the doctrine, for it is needless to state that the inability of either the Federal or State governments to tax the agencies or instrumentalities of the other is one of the great implications of the Constitution. In that case Congress incorporated the Bank of the United States for fiscal purposes, and the State of Maryland sought to impose a tax upon it. Chief Justice Marshall, in his luminous opinion, after deducing from the Constitution

the power to create a bank for fiscal purposes, says, with reference to the direct point now in question (p. 430):

> We find, then, on just theory, a total failure of this original right to tax the means employed by the Government of the Union for the execution of its powers. The right never existed, and the question whether it has been surrendered can not arise.

And again (p. 432):

> If the States may tax one instrument employed by the Government in the execution of its powers they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the Government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.

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> This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the State. *But this is a tax on the operations of the bank and is, consequently, a tax*

on the operation of an instrument employed by the Government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

It is obvious from these quotations that the class of subjects exempted were not those which are merely affected by the municipal regulations of a State, but are the direct agencies of the State itself. There must be a clear distinction between such direct agencies and instrumentalities and the class of subjects which are simply affected by municipal regulations. A municipal regulation, for example, may require that all telegraph and telephone wires which private corporations may lay shall be put under ground. The construction of the underground conduits, therefore, is an act which the corporation must do under the requirements of the State law as a condition for exercising their franchises, yet it can hardly be contended that such underground conduits are necessary agencies of the government and exempt from Federal taxation, even though essential to the safety of life and property. State laws may, for example, require factories and theatres to be equipped with permanent fire escapes, erected under the supervision of the municipal authorities, but fire escapes are not agencies of the Government, even though erected at the mandate of the State and under its direction.

The police powers of the State require the doing of innumerable acts and affect many classes of property, but it has never yet been contended that the property of citizens is for this reason and because of municipal control exempted from Federal taxation. These saloon

bonds do not differ in principle. While required by law, yet they are acts of the individual, and their requirement is nothing but a police regulation. They are simply designed to indemnify citizens in one case and the city in the other from any unlawful conduct by the licensee.

The Government assents to the proposition that the necessary independence of the Federal and State governments imposes a limitation upon the taxing power of each, and that neither can exercise such power in a manner that will curtail the rightful powers of the other or interfere with the free discharge of its governmental functions or destroy the means or agencies employed by it in the exercise of those powers and functions. *But this doctrine, being founded on no express provision of the Constitution and arising rather from necessary implication, must be fairly limited to such direct agencies or instrumentalities of government as are a necessary part of its administrative functions.* To enlarge the doctrine so as to admit of any property or any act which municipal law may seek to regulate might remove nearly all taxable property from the sphere of Federal taxation.

The appellant chiefly relies upon the class of cases which hold that the salaries or bonds of State officers can not be taxed. (*Dobbins* v. *Commissioners*, 16 Peters, 435; *Collector* v. *Day*, 11 Wallace, 113.) I do not dispute the doctrine of these cases. As government is impersonal, and can act only through human beings, its officers are the direct agents of the State, and as was said in both cases, "the salary or compensation

for the service of an officer was inseparably connected with the office." But such cases have no analogy whatever to a citizen not an officer or employee of the State, who, as a condition for obtaining a license to sell liquor, is required to give a bond. A liquor licensee is not an official or an agent of the State.

A liquor licensee has no more direct connection with the Government than a corporation which receives its charter, together with pecuniary or other aid from the United States, and which is sometimes used by the United States for governmental purposes, such as the carriage of the mails or the transportation of troops, etc., and yet such corporation was held to be taxable on the ground that it was not an agency or instrumentality of the State. See *Railroad Company* v. *Peniston*, 18 Wall., 5; *Thompson* v. *Union Pacific Railroad Company*, 9 Wall., 579.

In the latter case the railroad company was employed in the service of the Government and claimed exemption on that ground. The road was constructed under the direction and authority of Congress for the uses and purposes of the United States. These aids were granted by Congress in the exercise of its constitutional powers to regulate commerce, to establish post-offices and post-roads, to raise and support armies, and to suppress insurrection and invasion; and it was, therefore, claimed to be an instrumentality of Government.

Said Chief Justice Chase (p. 589):

> It is unquestionably true that the court, in determining the second general question, already stated, did hold that the Bank of the United

States, with its branches, was exempt from taxation by the State of Maryland, although no express exemption was found in the charter. *But it must be remembered that the Bank of the United States was a corporation created by the United States;* and, as an agent in the execution of the constitutional powers of the Government, was endowed by the act of creation with all its faculties, powers, and functions. It did not owe its existence, or any of its qualities, to State legislation. And its exemption from taxation was put upon this ground. Nor was the exemption itself without important limitations. It was declared not to extend to the real property of the bank within the State, *nor to interests held by citizens of the State in the institution.* * * *

It is true that some of the reasoning in the case of *McCulloch* v. *Maryland* seems to favor the broader doctrine. But the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible in the use of its franchises, to the Government of the United States.

We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch* v. *Maryland* beyond its terms. We can not apply it to the case of a corporation deriving its existence from State law, exercising its franchise under State law, and holding its property within State jurisdiction and under State protection.

We do not doubt the propriety or the necessity, under the Constitution, of maintaining the

supremacy of the General Government within its constitutional sphere. We fully recognize the soundness of the doctrine that no State has a "right to tax the means employed by the Government of the Union for the execution of its powers." *But we think there is a clear distinction between the means employed by the Government and the property of agents employed by the Government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means.*

We perceive no limits to the principle of exemption which the complainants seek to establish. It would remove from the reach of State taxation all the property of every agent of the Government. Every corporation engaged in the transportation of mails, or of Government property of any description, by land or water, or in supplying materials for the use of the Government, or in performing any service of whatever kind, might claim the benefit of the exemption. The amount of property now held by such corporations, and having relations more or less direct to the National Government and its service, is very great. And this amount is continually increasing; so that it may admit of question whether the whole income of the property which will remain liable to State taxation if the principle contended for is admitted and applied in its fullest extent may not ultimately be found inadequate to the support of the State governments.

In *Railroad Company* v. *Peniston* (18 Wall., 5) the State imposed a tax upon the real and personal prop-

erty of the Union Pacific Railroad Company, a corporation chartered by Congress, and which Congress assisted by donations of lands and loans, and in whose internal control it participated by the appointment of two directors. The loans were made on condition that the company should serve certain governmental purposes. The court held that such taxes were lawful.

Said Mr. Justice Strong (p. 30):

> There are, we admit, certain subjects of taxation which are withdrawn from the power of the States, not by any direct or express provision of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the National Government is legitimately exercised within the States. While it is true that government can not exercise its power of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National Government. The Constitution contemplates that none of those powers may be restrained by State legislation. But it is often a difficult question whether a tax imposed by a State does in fact invade the domain of the General Government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It can not be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited

> by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, coexistent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise.

In *United States* v. *Railroad Company* (17 Wall., 322) it was held that a tax upon the bonds of the Baltimore and Ohio Railroad by the Federal Government was invalid to the extent that such bonds were held by the city of Baltimore; not because the bonds of railway companies could not be taxed, but because the act in question was in effect a taxation of the city of Baltimore, and the collection of the money from the railroad company was a mere method of collecting it.

In the *Income Tax case* (157 U. S., 429), the court was unanimous that the income from municipal bonds could not be taxed, and in the opinion by Chief Justice Fuller the authorities on the general question are reviewed (pp. 583, 586).

It will be observed that all of the cases in which the power of taxation has been withheld are predicated upon the fact that the things taxed are the direct property or acts or agencies of the State, and are not things done

by an individual at the command of the State as an incident of police regulation. This is the vital distinction between this line of cases and the case at bar.

The fact that the obligor in the bond becomes a licensee by operation of law is not important. Even if it were, the two sureties who join in the execution of the bonds do not occupy even a quasi-official relation to the State Government.

There may be persons having relations with the Government who are not necessarily agencies of the Government. In *Whitehouse* v. *Langdon* (10 N. H., 331) a contractor for carrying the United States mail was held not to be an officer of the United States Government. While an oppressive tax might be levied upon the emoluments of such contractor, and thus the operations of the Government might be indirectly and incidentally affected, yet such fact will not work an exemption.

The most recent attempt to exempt property from Federal taxation under the doctrine of *McCulloch* v. *Maryland* was *Knowlton* v. *Moore*, (178 U. S., 41). In that case it was argued by the appellants that the transmission of property after death being exclusively the creation of State law, that it was not the subject of Federal taxation, as such taxation would interfere and perhaps destroy such creation of State law. This court, while conceding that the "right to regulate successions" is vested in the States and not in Congress (p. 58), yet held that inheritance duties could be imposed by Congress. The clear distinction between a taxable subject which may be affected

by legal regulations and the direct agencies of the State is plainly pointed out by this court. Referring to the contention that the right of transmission after death, being the creation of State legislation, could not be taxed by Congress, Mr. Justice White says (p. 59):

> But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the Government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National Government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State can not be taxed, because it had been at some prior time the subject of exclusive regulation by Congress? Again, in-

terstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several States because Congress may regulate interstate commerce? *Conveyances, mortgages, leases, pledges, and indeed all property, and the contracts which arise from its ownership, are subject more or less to State regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto can not be taxed by Congress, even in the form of a stamp duty.* It can not be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the national and State governments are divested of those powers of taxation which from the foundation of the Government admittedly have belonged to them. Certainly a tax placed upon an inheritance or legacy diminishes to the extent of the tax the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate.

Referring to the argument urged in that case, as it has been urged in this, that the power of the Government to tax is the power to destroy, Mr. Justice White further says (p. 60):

> But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation—that is to say, if a lawful tax can be defeated because the power which is

> manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied. Under our constitutional system both the National and the State governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established.

The indisposition of this court to extend this implied constitutional restriction of the taxing power is further illustrated by the case of *United States* v. *Perkins* (163 U. S., 625). In the case a citizen of New York State bequeathed personal property by will to the United States, and the question arose whether the bequest was subject to the State inheritance law. This court held that it was, Mr. Justice Brown saying (p. 630):

> We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the Government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it.

Reasoning by analogy, I submit that a bond which an applicant for a license gives as a condition prece-

dent to obtaining a license is not only his act but his property until delivered to the State, and the imposition of a stamp duty upon it, while in his hands and under his control, is, therefore, not the taxing either of the property of the State or of anything done by the State. To hold otherwise would be a very great and perhaps dangerous extension of the doctrine of implied exemptions from the taxing power of State and nation.

At first blush the appellant's contention may seem comparatively unimportant. On the contrary, it is a very serious denial of the power of the Federal Government to tax, a power which is vital to its existence. If sustained by this court each State could put much of the taxable property of its citizens beyond the reach of the Federal tax-gatherer by simply bringing it within the operation of its police regulations. Such a decision could not be other than serious. Every presumption should be against such a curtailment of the taxing power of the Federal Government. Apart from the fact that, as I have said, the exemption is but an implication of the Constitution, it is true, as was said by Mr. Chief Justice Waite, in the *Sinking Fund* cases, (99 U. S., 700, 718):

> Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt.

JAMES M. BECK,
Assistant Attorney-General.

O

Supreme Court of the United States.

No. 14.—October Term, 1902.

Peter Ambrosini, Plaintiff in Error, vs. The United States. } In error to the District Court of the United States for the Northern District of Illinois.

[October 20, 1902.]

This was a writ of error brought to reverse a judgment of the District Court imposing a fine on a finding of guilty of an offense under section seven of the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," (30 Stat. 448, c. 448,) otherwise known as the war revenue act of 1898. The indictment contained two counts. The first charged that defendant on August 30, 1898, executed a certain bond in the penal sum of $3,000 to the People of the State of Illinois without affixing to the bond a fifty-cent revenue stamp, alleged to be required by said act of Congress. The second count charged that defendant on August 30, 1898, executed a certain bond to the city of Chicago in the penal sum of $500 without affixing thereto a fifty-cent revenue stamp, alleged to be required by the act. The bonds were set forth *in extenso*. A motion to quash the indictment was made and overruled, and, a jury being waived, the cause was submitted to the court for trial, defendant found guilty, and sentenced to pay a fine. The opinion is reported 105 Fed. Rep. 239.

Sections 6, 7 and 17 of the act are as follows:

"Sec. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule. . . .

"Sec. 7. That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court."

"SEC. 17. That all bonds, debentures, or certificates of indebtedness issued by the officers of the United States Government, or by the officers of any State, county, town, municipal corporation, or other corporation exercising the taxing power, shall be, and hereby are, exempt from the stamp taxes required by this act: *Provided*, That it is the intent hereby to exempt from the stamp taxes imposed by this act such State, county, town, or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing, or municipal capacity: *Provided further*, That stock and bonds issued by co-operative building and loan associations whose capital stock does not exceed ten thousand dollars, and building and loan associations or companies that make loans only to their shareholders, shall be exempt from the tax herein provided."

Schedule A contained this provision: "Bond: For indemnifying any person or persons, firm, or corporation who shall have become bound or engaged as surety for the payment of any sum of money, or for the due execution or performance of the duties of any office or position, and to account for money received by virtue thereof, and all other bonds of any description, except such as may be required in legal proceedings, not otherwise provided for in this schedule, fifty cents."

The bonds, to which it was alleged the stamps should have been affixed, were bonds required by the laws of Illinois to be given as a condition of the issue of licenses to keep dram shops or sell intoxicating liquors in the State of Illinois and in the city of Chicago.

Sections one, two and five of an act of the general assembly of the State of Illinois, entitled "An act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors," read:

"§ 1. That a dram-shop is a place where spirituous or vinous or malt liquors are retailed by less quantity than one gallon, and intoxicating liquors shall be deemed to include all such liquors within the meaning of this act.

"§ 2. Whoever, not having a license to keep a dram-shop, shall, by himself or another, either as principal, clerk or servant, directly or indirectly, sell any intoxicating liquor in any less quantity than one gallon, or in any quantity to be drank upon the premises, or in or upon any adjacent room, building, yard, premises or place of public resort, shall be fined not less than twenty dollars ($20) nor more than one hundred dollars ($100), or imprisoned in the county jail not less than ten nor more than thirty days, or both, in the discretion of the court."

"§ 5. No person shall be licensed to keep a dram-shop, or to sell intoxicating liquors, by any county board, or the authorities of any city, town or village, unless he shall first give bond in the penal sum of $3,000, payable to the People of the State of Illinois, with at least two good and sufficient sureties, freeholders of the county in which the license is to be granted, to be approved by the officer who may be authorized to issue the license, conditioned that he will pay to all persons all damages that they may sustain, either in person or property, or means of support, by reason of the person so obtaining a license selling or giving away intoxicating

liquors. The officer taking such bond may examine any person offered as security upon any such bond, under oath, and require him to subscribe and swear to his statement in regard to his pecuniary ability to become such security. Any bond taken pursuant to this section may be sued upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away any intoxicating liquor by the person so licensed, or by his agent or servant." 2 Starr & Curtis, Anno. Stat. Ill. (2d ed) 1586, c. 43.

By article five, chapter 24, of the statutes of Illinois concerning cities, it was provided:

"§ 1. The city council in cities, and president and the board of trustees in villages, shall have the following powers:" . . .

"*Fourth.* To fix the amount, terms and manner of issuing and revoking licenses." . . .

"*Forty-sixth.* To license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license: . . . *Provided, further,* That in granting licenses, such corporate authorities shall comply with whatever general law of the State may be in force relative to the granting of licenses."

. . . "*Ninety-sixth.* To pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper: . . ." 1 Starr & Curtis, (2d ed.) 689, c. 24.

The Revised Code of Chicago of 1897 provided: "The mayor of the city of Chicago shall, from time to time, grant licenses for the keeping of dram shops within the city of Chicago to persons who shall apply to him in writing therefor, and shall furnish evidence satisfying him of their good character. Each applicant shall execute to the city of Chicago a bond, with at least two sureties, to be approved by the city clerk or city collector, in the sum of five hundred dollars, conditioned that the applicant shall faithfully observe and keep all ordinances in force at the time of the application or thereafter to be passed during the period of the license applied for, and will keep closed, on Sundays, all doors opening out upon any street from the bar or room where such dram shop is to be kept; and that all windows opening upon any street from such bar or room shall, on Sundays, be provided with blinds, shutters or curtains, so as to obstruct the view from such street into such room. No application for a license shall be considered until such bond shall have been filed." 1 Rev. Code, 1897, p. 253, c. XXXIX, art. I.

The ordinance contained many other specific regulations of the traffic, and provided that licenses might be revoked by the mayor for violation of "any provision of any ordinance of the city council relating to intoxicating liquors, or any condition of the bond aforesaid."

The conditions of the bond in the sum of $3,000 to the People of the State of Illinois were substantially in the words of the statute. The conditions of the bond in the sum of $500 to the city of Chicago were somewhat more stringent than the language of the municipal code.

Mr. Chief Justice FULLER delivered the opinion of the Court:

By the dramshop act the general assembly of Illinois legislated, as was stated in the title of the act, "against the evils arising from the sale of intoxicating liquors," not by prohibiting the traffic altogether, but by regulating it in protection of the public. The act concerning cities authorized municipal action subject to the general law.

The legislation was enacted in the exercise of the police power for the safety, welfare and health of the community, and it is conceded that that power is a power reserved by the States, free from Federal restriction in any particular material here.

The act and the ordinance required these bonds to be given as prerequisites to the issue of licenses permitting the sale. The licenses could not be issued without compliance with this condition precedent. The statute expressly provided that no license should be granted "unless he shall first give bond in the penal sum of $3,000," and the ordinance, that "no application for a license shall be considered until such bond shall have been filed."

The bonds were obviously intended to secure the proper enforcement of the laws in respect of the sale of intoxicating liquors; the prompt payment of fines and penalties; a remedy for injuries in person, property or means of support; and the protection of the public in divers other enumerated particulars. The granting of the licenses was the exercise of a strictly governmental function, and the giving of the bonds was part of the same transaction. To tax the license would be to impair the efficiency of State and municipal action on the subject and assumes the power to suppress such action. And considering license and bond together, taxation of the bond involves the same consequences. In themselves the bonds were not mere incidents of the regulation of the traffic, but essential safeguards against its evils, and governmental instrumentalities of State and of city, as authorized by the State, to insure the public welfare in the conduct of the business, although the business itself was not governmental. They were not mere individual undertakings to secure a personal privilege as suggested by the court below, but means for the preservation of the peace, the health and the safety of the community in compelling strict observance of the law, and remedying injurious results.

The general principle is that as the means and instrumentalities employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the

States exempt from taxation by the General Government. It rests on the law of self-preservation, for any government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government, exists only at the mercy of the latter. Nelson, J., *Collector* v. *Day*, 11 Wall. 113.

Viewed in the light of that general principle, we think it clear that Congress, lest the broad language of Schedule A, "and all other bonds of any description," might literally cover bonds such as those in question, and in avoidance of controversy in that regard, exempted them by section 17, wherein it was declared that it was intended "to exempt from stamp taxes imposed by this act, such State, county, town, or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing or municipal capacity." True, this language was used in a proviso, and the enacting clause exempted bonds "issued by the officers of any State, county, town, municipal corporation or other corporation exercising the taxing power;" but as the bonds were required by the State and the city and were issued for the benefit of the public and not for the benefit of the individuals who executed them, it appears to us that they came fairly within the meaning of the clause, assuming that they were covered by Schedule A. The question is whether the bonds were taken in the exercise of a function strictly belonging to the State and city in their ordinary governmental capacity, and we are of opinion that they were, and that they were exempted as no more taxable than the licenses. Either they were exempt, apart from the proviso, because, in the sense of the statute, issued by the State and city, or the proviso so far qualified the language of the enacting clause as to exempt them in exempting the State and city in respect of the exercise of strictly governmental functions.

We conclude, therefore, that they were not taxable within the statute. *United States* v. *Owens*, 100 Fed. Rep. 70; *Stineman* v. *Smith*, 100 Fed. Rep. 600; *Warwick* v. *Bettman*, 102 Fed. Rep. 127; *S. C.*, 108 Fed. Rep. 46; *People* v. *City*, 31 C. L. N. 247.

Judgment reversed and cause remanded with a direction to quash the indictment.

Mr. Justice HARLAN did not hear the argument and took no part in the decision.

True copy.

Test:

Clerk Supreme Court, U. S.